THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV No. 2016 - 00691

Between

WILT VINCENT

Claimant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice André des Vignes

Appearances:

Mr. Ronald Simon for the Claimant

Ms. Josefina Baptiste-Mohammed instructed by Ms. Lesley Almarales and Ms. Khadine Matthew for the Defendant

DECISION

DISPOSITION

1. Having considered the facts contained in the affidavit of the Claimant as well as the oral and written submissions of the parties and the relevant law applicable to the constitutional relief sought, I am of the opinion that:

    a. The Claimant is entitled to a declaration that the application and enforcement of the Zero Tolerance Policy (hereinafter referred to as "the Policy") by the Trinidad and Tobago Defence Force (TTDF) is an infringement of the Claimant's constitutional right to be presumed innocent until proven guilty according to law, pursuant to **Section 5(2)(f)(i) of the Constitution** and is therefore unlawful, null and void and of no effect; and

b. The Claimant is entitled to damages in the amount of $70,000.00 for the breach of the aforementioned constitutional right as well as exemplary damages in the amount of $20,000.00.

REASONS

The Claimant is entitled to a declaration that the application and enforcement of the Policy by the Trinidad and Tobago Defence Force is an infringement of the Claimant's constitutional right to be presumed innocent until proven guilty according to law, pursuant to Section 5(2)(f)(i) of the Constitution

2. Section **5(2)(f)(i) of the Constitution** guarantees any person charged with a criminal offence, the right to be presumed innocent until proven guilty according to law. In his affidavit, the Claimant gave evidence that he was charged with certain firearm related offences on or about 3rd November, 2013. Thereafter, on or about 19th November, 2013 the Claimant was informed by Major Ganesh of the TTDF of the Policy in force in relation to members of the TTDF charged with criminal offences and that pursuant thereto he would be discharged on the ground that his services were no longer required.
3. A close examination of the Policy[1] reveals that:
    a. The Chief of Defence Staff is thereby empowered to discharge "*with all convenient speed*" any member of the TTDF who has been charged with any criminal offence;
    b. Where such member is a Non-Commissioned Officer the grounds for discharge shall be 'services no longer required'; and
    c. The discharge shall not prejudice the right(s) of the member to be given an "*opportunity to be considered for re-enlistment*" to the TTDF "*upon the successful completion and/or dismissal of their court matter*" and, in such case, their rank, seniority and service would be preserved. However, the opportunity to be considered for re-enlistment shall only arise where the member's case has been discharged and/or dismissed on its merits by "*a full fledge trial and not on any technical grounds"*
4. In effect, therefore, the Policy purports to empower the Chief of Defence Staff to summarily discharge a member of the TTDF, such as the Claimant, who has been charged with a criminal offence even though he has not been yet been found guilty of that offence in a court

[1] Annexed as WV3 to the Claimant's Affidavit at paras. 1-5.

of law. In my opinion, this is contrary to the recognition and protection of the fundamental human right and freedom afforded to every citizen of Trinidad and Tobago to be presumed innocent until proven guilty. The constitutional rights enshrined in the Constitution are not suspended, superseded, restricted or in any way limited by the fact that a person is in the service of the TTDF and/or subject to military law.

5. The Policy also purports to give recognition to the presumption of innocence by allowing a member who has been discharged to be **considered** for re-enlistment in the event that the charges against him are dismissed on the merits pursuant to a full trial. The effect of this clause, therefore, is that if the charges are dismissed without a trial or on technical grounds (for example, non-appearance by the police and or a virtual complaint), the discharged member is not entitled to be considered for re-enlistment.
6. In my opinion, that clause does no more than pay lip-service to the presumption of innocence since it does not limit the power of the Chief of Defence Staff to summarily discharge a member upon a criminal charge being laid against him and before he has been found guilty of any offence.
7. At the hearing of this matter on 30th January, 2017, Counsel for the Defendant submitted that the Policy as worded was not consistent with the constitutional right to be presumed innocent until found guilty of a criminal charge. Further, in her supplemental written submissions, Counsel stated that *"perhaps one can say that the Claimant may be entitled to a declaration that his rights as particularized in Section 5(2)(f) of the Constitution have been breached through the unlawful application of a zero tolerance policy by the Trinidad and Tobago Defence Force."*

Further and/or other Relief

8. At the hearing on 30th January, 2017, Counsel for the Claimant sought to rely on paragraph 9 of the Fixed Date Claim Form which claimed "*such further and/or other relief as the nature of the case may require*" to support his submission that the Court could make an Order quashing the decision of the TTDF to discharge the Claimant. Further, in the supplemental written submissions filed on 8th February, 2017, Counsel sought the revised declaration[2] that the Claimant's discharge from the TTDF contravened his constitutional rights to the

[2] Claimant's supplemental submissions filed on 8th February, 2017 at p.2, para. a.

protection of the law and to a fair hearing (as guaranteed under sections 4(b) and 5(2)(e) of the Constitution respectively) and was therefore illegal, null and void and of no effect. In my opinion, this declaration cannot now fall to be considered as it was not initially sought by the Claimant in the Fixed Date Claim Form filed on 9th March, 2016. Further, in my opinion, the Claimant is not entitled to rely on clause 9 thereof to belatedly seek such relief. Accordingly, the Claimant is not entitled to this declaration sought.

The Claimant is entitled to damages in the amount of $70,000.00 for the breach of his constitutional right as well as exemplary damages in the amount of $20,000.00.

9. The learning is clear that there is no constitutional right to damages. However, pursuant to **Section 14 of the Constitution** the Court has a discretion to award damages based on the circumstances of the case. The leading authority is a decision of the Privy Council in **Seepersad and Panchoo v AG**[3]. Therein, Lord Hope stated:

> *"[38] It is well established that the power to give redress under section 14 of the Constitution for a contravention of the applicant's constitutional rights is discretionary: Surratt v Attorney General of Trinidad and Tobago [2008] UKPC 38, para 13, per Lord Brown of Eaton-under Heywood. The rights protected by section 4 are, as Lord Bingham of Cornhill said in the first stage of the appeal before the Board in that case, at least in most instances, not absolute: Surratt v Attorney General of Trinidad and Tobago [2007] UKPC 55, [2008] AC 655, para 33. There is no constitutional right to damages. In some cases a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened: Inniss v Attorney General of St Christopher and Nevis [2008] UKPC 42, para 21; James v Attorney General of Trinidad and Tobago [2010] UKPC 23, para 37. In others it will be enough for the court to make a mandatory order of the kind that was made in this case, when Madam Dean-Armorer ordered that the terms of the appellants' detention should be determined by the High Court. As Lord Kerr said in James v Attorney General of Trinidad and Tobago, para 36, to treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14. It will all depend on the circumstances"* [emphasis mine].

[3] 2012 UKPC 4 at para. 38.

10. Counsel for the Claimant submitted that an award of damages was necessary to vindicate the Claimant for the breach of his constitutional right and his unlawful discharge. Counsel also submitted that the actions of the TTDF depicted a gross abuse of power and arbitrary conduct which this Court should seek to deter immediately. In respect of quantum, he proposed that an award of damages in the amount of $100,000.00 and exemplary damages in the amount of $50,000.00 was reasonable in the circumstances. He relied on the authorities of: **Ramanoop v The Attorney General of Trinidad and Tobago (HCA S-47 of 2001); Naidike v The Attorney General of Trinidad and Tobago (Civ. App. No. 86 of 2007);** and **Mitchell v The Attorney General of Trinidad and Tobago (CV 2007-03220)**.

11. Counsel for the Defendant submitted that the Claimant was not entitled to damages or an award of exemplary damages. She submitted that the Claimant's evidence with respect to an award of damages was deficient save for the cursory statement at paragraph 15 of his affidavit that he has not been able to obtain similar employment and only able to obtain menial jobs intermittently and that he has been deprived of the opportunity for promotional advancement and further re-engagement until his compulsory retirement date in 2024. She submitted that this evidence was insufficient for the Court to make a significant award of **damages. Counsel relied on James v The Attorney General of Trinidad and Tobago, [2010] UKPC 23; Seepersad (supra); Ramanoop (supra);** and **Maharaj v The Attorney General of Trinidad and Tobago, Civ App No. 118 of 2010**. However, Counsel also submitted that should the Court be willing to award damages, the award should be a nominal sum of no more than $20,000.00 to $30,000.00 with no further award for exemplary damages.

12. Having examined the authorities on quantum, I have made the following observations:

    a. In **Ramanoop** (supra), delivered on 14th February, 2008, it was undisputed that the Applicant was unlawfully assaulted and battered by a Police Officer whose conduct was held to be reprehensible and despicable and in disregard of the applicant's fundamental rights. On this basis, Rajnauth-Lee J., (as she then was), was of the view that the award made at first instance (namely, $18,000.00 for deprivation of liberty and $35,000.00 for breach of the right to security of the person) did not vindicate the Applicant's infringed constitutional rights. In light of this, she awarded an additional

sum of $60,000 which she found would reflect the sense of public outrage, emphasize the importance of the constitutional right and deter further breaches. In the case at bar, the Claimant would not have been subjected to the tortious conduct of assault and battery meted out in that case. Further, he would not have undergone unlawful arrest and detention.

b. In **Naidike** (supra) the Court of Appeal determined, *inter alia*, that the award for compensatory and vindicatory damages to the Claimant were too low and increased these awards from $250,000.00 to $350,000.00 and from $50,000.00 to $75,000.00 respectively. Notably, the Appellant was unlawfully detained for 69 days, deprived of his liberty, humiliated by officers and subjected to appalling and deplorable conditions. Jamadar JA stated as follows:

> *"36. In my opinion, in this case, given the context and circumstances of the arrest, the conditions and duration of detention, the injuries to Dr. Naidike (some of which are apparently permanent), including the distress, anxiety, humiliation and inconvenience associated with all of the attendant circumstances, a fair, just and appropriate award for constitutional compensatory damages is $350,000.00…*
>
> *42. In relation to what is now referred to as an additional award, beyond compensation, to reflect specifically the vindication of the constitutional violation where the award for compensation may not fully achieve this, I am of the opinion that an appropriate award for this purpose is $75,000.00 and not $50,000.00 as the trial judge ordered. Lord Nicholls in Ramanoop (at paragraph 19) identified four elements that need to be considered in relation to the constitutional violation: (i) the sense of public outrage; (ii) the importance of the constitutional right; (iii) the gravity of the breach; and (iv) the deterrence of further breaches."*

Again, in this case, the Claimant has not been subject to tortious conduct as that experienced by the Claimant, **Naidike** (supra).

c. In **Mitchell** (supra) delivered on 12th June, 2008, the Claimant was awarded general damages, including aggravated damages, in the amount of $100,000.00 as well as exemplary damages of $25,000.00 for the torts of wrongful arrest and false

imprisonment. This case is distinguishable from the instant matter since the issue of damages for breach of constitutional rights did not arise therein.

13. Further, I have examined the quantum of damages awarded in matters where the proceedings, like that of the instant matter, focused on the breach of constitutional rights as opposed to other tortious elements. See: Judgement of Kokaram J. in **Lawrence & Others v The Attorney General of Trinidad and Tobago**[4] and **BS v Her Worship Marcia Ayers-Caesar and Another**, which was heard together with **SS v Her Worship Marcia Ayers-Caesar and Others.**[5]

14. In **Lawrence** (supra) court proceedings were instituted by the Claimants on the basis that they were denied their constitutional right to Counsel. Kokaram J. found that the Claimants' constitutional rights were infringed and as a result they were entitled to monetary compensation in the amount of $10,000.00 each to "*vindicate*" this breach. On the issue of damages, he stated as follows:

> *"50. The Court has the discretion to grant relief beyond a mere declaration under section 14 of the Constitution. Although there is no constitutional right to damages, in my view, this is a fitting case for an award of damages. Although an award of damages in this case would not be a significant sum as there is no quantifiable loss or damage suffered by the Claimants, it is, appropriate to reflect this Court's emphasis of the importance of the constitutional right and the gravity of the breach in the case of minors and to defer further breaches."*

15. It is to be noted that in deciding to award each Claimant damages in the sum of $10,000.00, Kokaram J. took into account that there was no evidence of loss or harm to the Claimants as a result of the breach of their constitutional rights and that their Attorneys-at-Law gained access to them in a short space of time.

16. In **BS** (supra) and **SS** (supra) the issue before the Court was the breach of the Claimants' constitutional rights to due process, protection of the law and not to be exposed to cruel and unusual treatment. On the issue of damages, Kokaram J. expressed the following view on the law:

[4] CV 2015-02257 delivered on 19th October, 2016.
[5] CV 2015-02799 and CV 2015-3725 delivered on 24 May, 2016.

"311. … .If the court finds that monetary compensation is the proper and just award, it can then award a single sum for damages. There is no need for a separate award under the banner of a vindicatory award. In the Attorney General v Mukesh Maharaj Civ. App. No 67 of 2011, the court said:

> *"'Vindication' of the right applies in both the widest and narrowest of senses. To the extent that a compensatory award is granted in respect of the breach of the right and as 'recompense for the inconvenience and distress suffered during the illegal detention' (per Maharaj v A-G of Trinidad and Tobago (No 2) [1978] 30 WIR 310), such an award is, in the widest sense, a vindication of the right.*

Archie C.J further stated that:

> *"It has always been my view that this expression is somewhat misleading and that there should be a single award of damages to take into account all that is reasonable and just in the circumstances. I am fortified in this regard by the observations of Lord Toulson in the most recent Privy Council case of Alleyne & Ors v The Attorney General [2015] UKPC 3 where he acknowledges that any award under section 14 of the Constitution, however described, 'has the character of a general award' and that does not change by virtue of the fact that it may be outside of what may be regarded as quantifiable pecuniary loss.…If the purpose of any 'additional award' is not punitive then any other intended purpose can be achieved by its explicit recognition in the overall quantum awarded without any need to set out a separate sum…the expression "vindicatory damages" in the sense of a separate award has a rather tenuous lineage. A careful reading of the authorities convinces me that it has never really been expressly approved by the Privy Council (at least as a requirement), and its use may be misleading in that it may tempt trial courts to artificially and doubly compensate claimants in respect of breaches that are properly compensable by a single and undifferentiated award of 'damages'."*

312. Bereaux, J.A. who delivered the judgment in Mukesh Maharaj CA CIV 118/2010 CA CIV 67/2011 when addressing the submission on vindicatory damages at paragraph 48 said:

> *"I find it difficult to conceive of the need to award an additional sum to vindicate the right, when in virtually every case the gravity of the constitutional violation will already have formed part of the compensatory award. Such an additional award in my judgment has more than just a suggestion of double counting, if not of punishment"*

313. In James v AG of Trinidad and Tobago (2010) UKPC 23 at para 36- 37 the Privy Council observed that compensation in the context of constitutional law can be seen to perform two functions. Redress for the 'in personam' damage suffered. Vindication of the

constitutional right which does not have a punitive element but is making the mark that a constitutional breach has occurred. It is not suggested that some specific type of damage suffered by the victim of the constitutional breach was necessary before the question of monetary compensation could be considered.

314. Recently the CCJ also contributed to the discussion of the appropriate award of damages. In the case of Lucas and another v Chief Education Officer and others (2015) 86 WIR 100, the Court at para 153 and 154 said:

> *"A determination that there was no fundamental rights breach naturally would mean that there is no scope for awarding the appellants any constitutional redress. In light of some of the views expressed by the Court of Appeal, I believe it is important, notwithstanding, to say something about allegations of damage, that is to say injury, in cases of this kind. The impression that was given was that there was here no evidence of such damage and therefore no evidence of constitutional violation and/or, even if fundamental rights were infringed, since no injury was established there was no basis on which to award damages or any other form of redress. These are two separate issues. Not every finding of constitutional breach will yield monetary damages. But a mere declaration that an arm of government has acted in contravention of the Constitution constitutes in itself powerful relief, even in circumstances where the victim of the violation can establish no entitlement to monetary damages. Any notion that a finding of constitutional infringement should be premised on an applicant's ability to establish an entitlement to monetary damages must be rejected. When a litigant approached the court for constitutional redress the court is as much concerned about compensating the wronged citizen as it is with upholding the rule of law. In these judicial review proceedings an award of damages could properly have been made provided that (a) damages were claimed on the fixed date claim form; or (b) the facts set out in the claimant's affidavit or statement of case justified them; and (c) the court was satisfied that, at the time when their application was made, the claimant could have issued a claim for damages for breach of a constitutional right."*

17. Kokaram J, went on to hold that, *inter alia*, damages was an effective remedy for the breach of the aforementioned rights and awarded the Claimants in these matters $150,000.00 and $300,000.00 respectively. In arriving at this decision he reasoned that:

> *"316. The compensation to be awarded to the Claimants is as a result of the failure of the legal system or the executive's administrative process to have in place a Community Residence appropriate for their respective detentions.*

317. I consider compensation appropriate in these cases taking into account the following: In the case of BS (i) His age, (ii) the period of his detention, (iii) the conditions under which he has been kept which were not in conformity with the Community Residences Act (iv) his obvious signs of deficient learning skills as seen in his assessment by the Children's Authority and the YTC. (v) The failure of YTC to provide a relevant and child specific treatment plan for BS to address his obvious deficiencies (vi) the social interaction with boys over the age of 18 (vii) I have also taken into account the evidence of Mr. Scanterbury with respect to the care which BS actually received and the fact that there was no deplorable physical conditions in which he was housed.

318. SS was subjected to "prison-like" conditions and treated as a young adult in an adult prison. She ought not to have been placed in a woman's prison amongst other convicted persons and in conditions which were designed to treat and reform adult prisoners. She associated with adults even in a limited way through the eyes of the child this would have been a startling, frightening and scarring experience. There was an apparent lack of proper amenities and facilities to preserve her human dignity as a vulnerable child."

18. Having reviewed the authorities submitted by the respective parties on this issue as well as the recent decisions highlighted above and in the exercise of my discretion under **Section 14 of the Constitution**, I am of the opinion that the Claimant is entitled to an award of damages in the amount of $70,000.00 for the breach of his constitutional right guaranteed under **Section 5(2)(f)(i) of the Constitution**. Having regard to the circumstances of this case as well as my earlier finding that the Claimant's constitutional right to the presumption of innocence was infringed, I am of the opinion that he is entitled to an award of damages to compensate him for this breach. Based on the Claimant's unchallenged affidavit evidence, he was discharged from the TTDF on the basis of its Policy. Accordingly, I consider the aforementioned award reasonable in these circumstances and more importantly fitting to emphasize the importance of the breached constitutional right, the gravity of the breach and to deter any further breaches.

19. The law on the purpose of an award of exemplary damages is well settled.[6] In consideration of these legal principles as well as in the circumstances of this case, I am of the opinion that the action of the TTDF in implementing the Policy against the Claimant was arbitrary, oppressive and unconstitutional. In Trinidad and Tobago, every citizen has a fundamental right to the presumption of innocence and the very policy which was relied upon by the TTDF to discharge the Claimant violated this right. This action ought to be condemned and the TTDF punished for such a crucial infringement. Accordingly, I am of the opinion that an award of exemplary damages in the amount of $20,000.00 is appropriate in this matter.

COSTS

20. Counsel for the Claimant has submitted in his supplemental written submissions that Claimant is entitled to costs pursuant to Part 67.5(2)(iii) in accordance with the costs budget in the amount of $141,500.00 filed on 9th March, 2016.

21. Counsel for Defendant has submitted in her supplemental written submissions that although the Claimant filed a Budgeted Costs Application, this was not dealt with at the appropriate stage pursuant to Part 67. Accordingly, costs are to be assessed pursuant to Part 56.14(4) and (5): Mohammed v The Attorney General of Trinidad and Tobago, Civ App No. 75 of 2013.

22. I accept the submissions of Counsel for the Defendant. The Claimant's application for Budgeted Costs was never heard and accordingly this Court made no order as to budgeted costs in this matter. In relation to the determination of costs payable in administrative actions brought pursuant to Part 56 the decision of the Court of Appeal in **Mohammed** (supra) in instructive. Therein Jamadar JA. held that the *"trial judge erred in law and was plainly wrong when she quantified the Appellant's costs as prescribed costs pursuant to rule 67.5 and not as assessed costs pursuant to rule 67.12."*[7]

23. In his analysis of the issue, Jamadar JA. stated as follows:

[6] Rookes v Barnard, (1964) AC 1129; Kuddus v Chief Constable of Leceistershire, (2002) AC 122 at para 63; Merrick v The Attorney General of Trinidad and Tobago and Others, Civ App No. 146 of 2009

[7] Mohammed (supra) at para. 23.

"21. … The trial judge held that the Appellant was entitled to his costs and proceeded to quantify those costs (about which there is no complaint). However, the trial judge determined that there having been no provision made for budgeted costs and fixed costs not being applicable, that the appropriate way to quantify the costs of the Appellant was pursuant to rule 67.5 – as prescribed costs. Further, that because the claim was not for a monetary sum and no value had been attributed to it pursuant to rule 67.6, the claim was to be treated as a claim for $50,000.00 pursuant to rule 67.5 (2) (b) (iii) and therefore the only costs payable were $14,000.00…

24. Part 56, CPR, 1998 has specific rules which govern both the hearing of constitutional claims ('applications for administrative orders') and the making of orders for and the assessment of costs on same. Not only must the judge hearing the matter determine whether it is just to make any orders for costs, but also what those orders should be. Then, if orders for costs are made the judge hearing the matter must also assess them. How is a judge to assess costs orders made upon the hearing of a constitutional claim (or any application for an administrative order)? The CPR, 1998 has two general Parts dealing with costs. Part 66 deals with the general principles governing the award of costs and Part 67 deals specifically with quantification.

Assessment of Costs: rule 67.12 (1), A Specific Provision

25. In so far as the assessment of costs may be considered a subset of quantification, Part 67 specifically provides for what is to be done "where costs fall to be assessed in relation to any matter or proceedings … other than a procedural application." Rule 67.12 (1) states:

> *"This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings other than a procedural application."*

26. Thus within Part 67 itself, rule 67.12 (1) clearly indicates that wherever and whenever "costs fall to be assessed" other than pursuant to a procedural application, say as provided for by another rule of the CPR, 1998, that such an assessment is to be done pursuant to rule 67.12, CPR, 1998.

27. In this case rules 56.14 (4) and (5) provide that the judge hearing the matter must decide whether costs are to be awarded and if so "he must assess them". How is that

assessment to be done? Rule 67.12 (1) unequivocally provides the answer: the assessment of the costs in relation to the hearing of the matter must be done pursuant to rule 67.12, CPR, 1998."

24. In the premises, I am of the opinion that the Claimant, having been successful in his substantive claim is entitled to cost to be assessed pursuant to **Part 67.12 of the CPR.**

ORDER

25. In the premises, I make the following Orders:

    a. This Court declares that the enforcement and application of the Zero Tolerance Policy by the Trinidad and Tobago Defence Force is an infringement of the Claimant's constitutional right to be presumed innocent until proven guilty according to law, pursuant to **Section 5(2)(f)(i) of the Constitution** and is therefore unlawful, null and void and of no effect;

    b. The Defendant do pay the Claimant damages in the sum of $70,000.00 and exemplary damages in the sum of $20,000.00; and

    c. The Defendant do pay the Claimant's cost of these proceedings, to be assessed by the Registrar pursuant to **Part 67.12 of the CPR,** in default of agreement.

Dated this 29th day of March, 2017

…….
André des Vignes
Judge