

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE  
SUB-REGISTRY- SAN FERNANDO**

**Claim No: CV2016-03631**

**IN THE MATTER OF APPLICATION BY RAVI BALGOBIN MAHARAJ FOR LEAVE  
TO APPLY FOR JUDICIAL REVIEW PURSUANT TO PART 56 RULE 3 OF THE  
CIVIL PROCEEDINGS RULES, 1998 AND  
THE JUDICIAL REVIEW ACT, CHAPTER 7:08**

**AND**

**IN THE MATTER OF APPLICATION BY RAVI BALGOBIN MAHARAJ UNDER THE  
FREEDOM OF INFORMATION ACT, CHAP 22:02**

**BETWEEN**

**RAVI BALGOBIN MAHARAJ**

**APPLICANT/INTENDED CLAIMANT**

**AND**

**THE PETROLEUM COMPANY OF TRINIDAD AND TOBAGO**

**RESPONDENT/INTENDED DEFENDANT**

**BEFORE THE HONOURABLE JUSTICE ANDRÉ DES VIGNES**

**Appearances:**

Mr. Anand Ramlogan, S.C., Ms. Jayanti R. Lutchmedial and Mr. Kent Samlal instructed by Mr. Douglas C. Bayley for the Applicant/Intended Claimant

Mr. Russell Martineau, S.C., and Ms. Dominique Martineau instructed by Ms. Marcelle Ferdinand for the Respondent/Intended Defendant

**DECISION**

**INTRODUCTION**

1. By ex parte application filed on 24<sup>th</sup> October, 2016, the Applicant sought leave to apply for judicial review of the decision of the Respondent to refuse to provide all witness statements filed in Case No 111988- World GTL Inc. and World GTL St. Lucia Limited v. Petrotrin

(hereinafter referred as “the arbitration proceedings”) requested by the Applicant pursuant to **Section 13 of the Freedom of Information Act, Chapter 22:02** (hereinafter referred to as “the FOIA”). The application was supported by an affidavit in the name of the Applicant filed on 24<sup>th</sup> October, 2016.

2. By letter dated 11<sup>th</sup> March 2016, the Applicant sought the disclosure of (i) the judgment delivered by the London Court of International Arbitration and (ii) all witness statements filed in the arbitration proceedings, following the decision of the Respondent to discontinue civil proceedings against Mr. Malcom Jones, former Executive President of the Respondent for negligence and breach of fiduciary duty.
3. According to the Applicant:
  - a. The decision by the Respondent to discontinue the civil proceedings effectively denied taxpayers the opportunity to vindicate the loss of \$3.3 billion dollars and also resulted in the further costs to taxpayers in the form of legal costs which must be paid to Mr. Jones;
  - b. The justification for the discontinuance of the action is deserving of public scrutiny and review;
  - c. The witness statements filed in the arbitration proceedings ought not to remain confidential after the completion of the arbitration and the delivery of the judgment therein;
  - d. The issue of confidentiality cannot and should not override the public’s access to the witness statements in the light of section 35 of the FOIA;
  - e. The Applicant has a statutory right of access to the requested information under the FOIA and this falls within the exception prescribed in Article 30.1 of the Rules of the London Court of International Arbitration.
4. The Applicant relied on the following grounds pursuant to **Section 5 of the Judicial Review Act**:
  - a. Failure to satisfy or observe conditions or procedure required by law;
  - b. Unreasonable, irregular or improper exercise of discretion;

- c. Conflict with the policy of the FOIA;
  - d. Breach of or omission to perform a duty;
  - e. Unauthorised or contrary to law;
  - f. Depriving the Applicant of a legitimate expectation that a decision will be made in accordance with the FOIA; and
  - g. Abuse of power and/or the exercise of power in a manner that was so unreasonable that no public authority could have so exercised the power.
5. The Applicant applied for leave to apply for judicial review to seek the following reliefs:
- a. An order of certiorari to remove into this Honourable Court and quash the decision of the Respondent to deny access to item (2) of the documents requested by the Applicant in his FOIA application dated 11<sup>th</sup> March 2016;
  - b. Alternatively and/ or additionally a declaration that the decision of the Respondent to refuse and/or deny the Applicant access to the information/documents requested in his application made under the FOIA dated 11<sup>th</sup> March 2016 is illegal and in breach of the provisions of the FOIA;
  - c. A declaration that the Applicant is entitled to access to the documents listed at item (2) of the request dated the 11<sup>th</sup> of March 2016 pursuant to the **Section 35 of the FOIA**;
  - d. An order of mandamus to compel the Respondent to disclose the documents listed at item (2) of the Applicant’s request under the FOIA within seven days hereof;
  - e. Costs; and
  - f. Such further other orders, directions or writs as the courts considers just and as the circumstances of this case warrant pursuant to **Section 8(1)(d) of the Judicial Review Act Chapter 7:08**.

### **BACKGROUND FACTS**

6. The Applicant is employed as a Communications Specialist at the constituency office for the Member of Parliament for San Juan/Barataria. He is also a member of the Opposition United National Congress and has described himself in affidavit filed on 24<sup>th</sup> of October 2016 as a “*social and political activist.*”

7. The Respondent is a state owned company incorporated under the **Companies Act, Chap. 81:01** whose registered office is located at Administration Building, Southern Main Road, Pointe a Pierre.
8. By letter dated 11<sup>th</sup> March, 2016, the Applicant wrote to the Respondent pursuant to **Section 13 of the FOIA** requesting access to the following documents:
  - a. The judgment delivered by the London Court of International Arbitration (hereinafter referred to as “the LCIA”) in Case No. 111988- World GTL INC and World GTL St Lucia Limited v- Petrotrin; and
  - b. All witness statements filed in Case No. 111988- World GTL INC and World GTL St Lucia Limited v- Petrotrin<sup>1</sup>
9. According to the Applicant, this request was made as a result of the Attorney General’s decision to discontinue civil proceedings against one Mr. Malcom Jones, a former Executive President of the Respondent Company for negligence and breach of fiduciary duty following the completion of Arbitration proceedings between the Respondent and World GTL St Lucia Limited.
10. By letter dated 22<sup>nd</sup> of April, 2016, the Respondent provided the Applicant with a copy of the judgment of the LCIA but refused to provide copies of the witness statements for the following reasons:
  - a. Documents relating to the second request are exempt under **Section 32 (1) of the FOIA** as they would disclose information or a matter communicated in confidence by or on behalf of persons to the Respondent and (a) the information would be exempt information if it were generated by the Respondent; and (b) the disclosure of the information would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Respondent to obtain similar information in the future;

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<sup>1</sup> See Applicant’s letter dated March 11<sup>th</sup> 2016 R.B.M 39 to the Applicant Affidavit filed herein on 24<sup>th</sup> October, 2016

- b. If the witnesses who have given witness statements in confidence are to have those statements disclosed, future potential witnesses would not be willing to give such evidence;
- c. Arbitration proceedings are confidential and the Arbitration Court which receives witness statements given in confidence will not in future be willing to provide arbitration services to the Respondent;
- d. The disclosure, if granted, is likely to destroy the usefulness of the Rules of the LCIA as an alternative form of resolving disputes to the Supreme Court so far as the Respondent and similar State entities are concerned;
- e. The agreement of the Respondent and similar State entities in the conduct of their business would be of greatly reduced value, if any;
- f. The disclosure of the witness statements would amount to a divulgence of information contrary to the provisions of the LCIA which governed the arbitration in question. Article 30 of the LCIA obligates all parties to keep confidential awards in the arbitration, together with all materials created for the purpose of the arbitration and all other documents produced by another party in the proceedings. Also the Rules provide in part that the deliberations of the Arbitral Tribunal shall remain confidential to its members; and
- g. Taking into account the overriding general public interest considerations set out at **Section 35 of the FOIA**, disclosure is not justified in the public interest in that damage would be done to the public interest which encourages litigants to settle their differences utilizing alternative dispute resolution processes such as arbitration by the LCIA. Disclosure will jeopardise the usefulness and availability of that procedure and is likely to deter witnesses from participating in the same in a full and frank manner. Further, there is a public interest in protecting an individual's personal information and right to privacy under the Constitution and the Data Protection Act and the witness statements contain such personal information which should not be disclosed without consent.

11. By letter dated 11<sup>th</sup> May, 2016, the Applicant requested from the Respondent a copy of the LCIA Rules and enquired whether edited versions of the witness statements could be provided. Under cover of the said letter, the Applicant also submitted a further request under the FOIA for any agreement signed by the Respondent with the LCIA regarding the conduct of proceedings or other rules, practice direction or guidelines.<sup>2</sup>
12. By its response dated 1<sup>st</sup> June, 2016, the Respondent provided the Applicant with a copy of the 1998 LCIA Rules. The Respondent also indicated that it had not signed any agreements with the LCIA in relation to the conduct of proceedings or other rules, practice directions or guidelines. When the Respondent entered into the Project Agreement with WGTL, the parties agreed that any arbitration would be conducted in accordance with LCIA Rules.
13. The Applicant, being dissatisfied with this response, dispatched a pre-action protocol letter dated 4<sup>th</sup> July, 2016 to the Respondent. The Respondent replied by letter dated 29<sup>th</sup> July, 2016 notifying the Applicant that they were “*in the process of obtaining legal advice on the matter and request an extension of time for one month*”. By letter dated 18<sup>th</sup> August, 2016, Petrotrin gave an undertaking to the Applicant’s Attorneys-at-Law that they would not raise any objection on the point of delay should an extension of time be granted to 29<sup>th</sup> August, 2016. The said extension was granted by letter dated 24<sup>th</sup> August, 2016. By letter dated 29<sup>th</sup> August 2016, the Respondent responded to the Applicant’s Attorneys-at-Law confirming, *inter alia*, that the documents would not be disclosed. On 24<sup>th</sup> October, 2016, the Applicant filed an application for leave to apply for judicial review.
14. Pursuant to this Court’s directions, the Applicant and Respondent filed written submissions on 30<sup>th</sup> November, 2016 and 16<sup>th</sup> January, 2017 respectively.

### **LEGAL PRINCIPLES – APPLICATION FOR LEAVE FOR JUDICIAL REVIEW**

15. The test to be applied by the Court on an application for leave to apply for judicial review is whether the Applicant has satisfied the Court that it has an arguable ground for judicial review that has a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.<sup>3</sup>

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<sup>2</sup> See Letter of Applicant’s Attorney on behalf of the Applicant dated 11<sup>th</sup> May, 2016

<sup>3</sup> *Sharma v Brown-Antoine*, [2007] 1 WLR 780 at 787E-H

16. Further, in the decision of **Ferguson & Another v The Attorney General of Trinidad and Tobago**,<sup>4</sup> Kangaloo JA. was of the view that in deciding whether or not to grant leave the Court ought not to adopt a stringent application of this test. He stated:

*“4. It would be a travesty if the words of their Lordships were taken to mean that the test of arguability lends itself to stringent application. To adopt such an approach would be to erode the very protection that is offered by the remedy of judicial review. The purpose of judicial review is to keep the executive in check and to prevent the citizen from arbitrary, unwarranted and unlawful executive action. Such protections are part of the wider concept of the rule of law which lies at the foundation of any democratic society. In this regard the observations of Lord Phillips of Worth Matravers are worthy of note:*

*“The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, private corporations, public bodies and the executive can order their lives and activities.....The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in my jurisdiction.*

*5. The main purpose of the permission stage in judicial review proceedings is still to eliminate unmeritorious applications brought by an applicant who is “no more than a meddling busybody”; an aim which is particularly beneficial in current times given the explosion of civil litigation which our justice system has witnessed. However in fulfilling its mandate as the guardians of democracy and the rule of law; concepts which can easily be seen as two sides of the same coin, the court must not lightly refuse a litigant permission to apply for judicial review. It must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing to grant leave.”*

## **REASONS**

17. I am not satisfied that the Applicant has shown an arguable ground for judicial review with realistic prospect of success with respect to any of the grounds on which the application is based.

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<sup>4</sup> Civil Appeal No. 207 of 2010

### **Failure to satisfy or observe conditions or procedure required by law**

18. The Applicant has not identified in his affidavit what, if any, procedures required by law that the Respondent has failed to satisfy or observe. Further, in his submissions, Counsel for the Applicant has not pointed to any evidence from the Applicant that supports this ground of the application.
19. On the other hand, the correspondence exchanged between the Applicant and the Respondent that has been exhibited to the Applicant's affidavit establish that the Respondent has complied with the procedures set out in the FOIA in terms of:
  - i. responding to the Applicant's request with the statutory period of 30 days through the designated officer;
  - ii. providing facts and reasons to explain its decision to treat the witness statements as exempt;
  - iii. informing the Applicant of his legal rights to write to the Ombudsman and to apply for judicial review; and
  - iv. showing that it considered and conducted the balancing exercise required by section 35 of the FOIA.
20. In the circumstances, in the absence of any evidence from the Applicant to support the allegation that the Respondent failed to satisfy or observe conditions or procedures required by law, I am of the opinion that the Applicant has not shown an arguable ground for judicial review with a realistic prospect of success.

### **Unreasonable, irregular or improper exercise of discretion**

21. In **Samlalsingh v. Ministry of Planning, Housing and the Environment**,<sup>5</sup> Justice Dean-Armorer considered the exercise of discretion by the Ministry in determining whether documents were to be treated as confidential pursuant to **Section 33 (1)(d) of the FOIA**. She stated:

*“The Ministry, by section 33, is entitled to take into account that the documents in question have consistently been treated by a third party as confidential. Whether the Ministry, as a public authority takes into account the confidential nature of documents, is a matter for*

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<sup>5</sup> CV 2009 - 03711



*their discretion and in the absence of irrationality, fall beyond the Court's power, reach and jurisdiction. The Court does not sit as an appellate court in respect of the decision of the public authority."*

22. In this case, the Respondent, in reliance on **Section 32(1) of the FOIA** has exercised its discretion to refuse to disclose the witness statements. The Court will not interfere with the exercise of that discretion unless there is evidence of irrationality on the part of the Respondent. In my opinion, the Applicant has failed to adduce any evidence that the exercise of discretion by the Respondent was irrational.
23. In the circumstances, the Applicant has not shown an arguable ground for judicial review with a realistic prospect of success.

#### **Conflict with the policy of the FOIA**

24. It is well settled by many authorities that the intention of the FOIA is to promote disclosure of information held by public authorities to the public. Further, there is a presumption that the public is entitled to access the information requested unless the public authority can justify its refusal of access based on the fact that the document is exempt from disclosure. Even when the document is exempt, **Section 35 of the FOIA** imposes an obligation on the public authority to give access thereto where there is:

*"reasonable evidence of significant*

*(a) abuse of authority or neglect in the performance of official duty; or*

*(b) injustice to an individual; or*

*(c) danger to the health of safety of an individual; or*

*(d) unauthorised use of public funds*

*has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."*

25. From the correspondence exhibited to the Applicant's affidavit, there is evidence that the Respondent, in keeping with the policy of the FOIA, considered whether the document is an exempt document and responded to the Applicant's request setting out why it considered that

the witness statements were exempt, namely that the information was provided by the witnesses to the Respondent's Attorneys-at-Law in the arbitration and as such, they were to be treated as confidential. The authorities are clear that the parties to an arbitration are subject to an implied obligation of confidence not to make use of material generated in the course of the arbitration. This obligation covers pleadings, written submissions, witness statements as well as transcripts and notes of evidence given at the arbitration.<sup>6</sup>

26. The Applicant has not cited any authority to support its contention that this implied obligation of confidentiality does not apply after the conclusion of an arbitration. In its response to the Applicant, the Respondent stated that the disclosure of the witness statements would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Respondent to obtain similar information in the future. The Applicant has not adduced any evidence or information to contradict this position.
27. The Respondent also stated that it is now engaged in two arbitrations and that there is a real likelihood that it will continue to have commercial disputes resolved by arbitration. Further, it has been experiencing reluctance and refusal of persons to appear as witnesses on its behalf and it has every reason to believe that persons will be deterred from giving evidence in international commercial arbitration if they know that their evidence might be disclosed to the public.
28. The Respondent also relied on Article 30 of the Rules of the LCIA which provides that *"unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain save and to the extent that disclosure may be required of a party by legal duty to protect or pursue a legal right to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."*
29. The Applicant has not challenged the evidence of the Respondent as summarised in paragraphs 27 and 28 hereof.

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<sup>6</sup> Ali Shipping Corp. v Shipyard Trogir [1998] 2 All ER 136 at 147; Dolling-Baker v. Merrett and others [1991] 2 All ER 890

30. In the circumstances, I am not satisfied that the Applicant has shown an arguable ground for judicial review with a realistic prospect of success on the basis that the decision of the Respondent is in conflict with the policy of the FOIA.

**Breach of or omission to perform a duty**

31. Based on my earlier findings, I am not satisfied that the Applicant has adduced any evidence that, in refusing to disclose the witness statements to the Applicant, the Respondent breached or omitted to perform its duties under the FOIA. In fact, the correspondence exhibited to the Applicant's affidavit demonstrates that the Respondent performed its duties under the FOIA.

32. In the circumstances, I am not satisfied that the Applicant has shown an arguable ground for judicial review with a realistic prospect of success on this basis.

**Decision unauthorised or contrary to law**

33. For the reasons already given I am satisfied that the Respondent's decision was in accordance with the provision of the FOIA, which permits a public authority to refuse to disclose a document which it considers to be exempt. In my opinion, the Applicant has failed to adduce any evidence that the Respondent's decision was unauthorised or contrary to law.

34. In the circumstances, I am not satisfied that the Applicant has shown an arguable ground for judicial review with a realistic prospect of success on this basis.

**Depriving the Applicant of a legitimate expectation that a decision will be made in accordance with the FOIA**

35. The Respondent accepts that there can be a legitimate expectation that the Applicant's request would be dealt with in accordance with the FOIA. Based on the evidence before me I am satisfied that the Respondent's decision to refuse to disclose the witness statements was made in accordance with the FOIA.

36. The Applicant has not adduced any evidence that the Respondent gave to him a clear and unambiguous promise or commitment to disclose the documents to him and/or that there was any practice by the Respondent to respond favourably in all circumstances to requests for disclosure of documents. Therefore, the Applicant has failed to discharge the burden of proving the legitimacy of his expectation.

37. In the circumstances, I am not satisfied that the Applicant has shown an arguable ground for judicial review with a realistic prospect of success on this basis.

**Abuse of power and/or the exercise of power in a manner that was so unreasonable that no public authority could have so exercised the power.**

38. The Court is entitled to review the decision of the Respondent on this ground to determine whether the Respondent has taken into account matters which it ought not to take into account or has refused or neglected to take into account matters which it ought to take into account or has come to a conclusion that is so unreasonable that no public authority could ever have come to it.

39. The documents before the Court establish that the Respondent's designated officer had before him all the relevant information before he responded to the Applicant. He considered the fact that the information for the witness statements had been furnished in confidence and that the witness statements had been prepared and used in the arbitration proceedings. He also considered the rules of the LCIA and the impact on future arbitrations and on obtaining evidence from witnesses in the future. He also took into account the provisions of **Sections 32 and 35 of the FOIA.**

40. The Applicant in his affidavit has not adduced any evidence of the Respondent's abuse of power in refusing to disclose the witness statements or that the refusal was so unreasonable that no public authority could have so exercised the power.

41. In the circumstances, I am not satisfied that the Applicant has shown an arguable ground for judicial review with a realistic prospect of success on this basis.

## **DISPOSITION**

42. In the premises, I am of the opinion that the application for leave to apply for judicial review is wholly unmeritorious and patently unarguable. Accordingly, the Applicant's application for leave to apply for judicial review is hereby dismissed with no order as to costs.

**Dated this 31<sup>st</sup> day of March, 2017**

.....  
**André des Vignes**  
**Judge**