

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-02265

BETWEEN

**BASDEO PANDAY
OMA PANDAY**

Claimants

AND

**HER WORSHIP MS. EJENNY ESPINET
DIRECTOR OF PUBLIC PROSECUTIONS**

**Defendant
Interested Party**

**JUDGMENT ON INTERLOCUTORY APPLICATION - FUTHER INFORMATION-
PART 35 CPR**

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. A. Beharrylal instructed by Ms. M. Panday for the Claimants

Mr. Neal Byam for Her Worship Ms. Ejenny Espinet

**Mr. D. Mendes, S.C. and Mr. I. Benjamin instructed by Ms. R Maharaj for the
Interested Party**

1. Introduction:

- 1.1 In this matter the Claimants have applied for judicial review of the decision of Her Worship Ms Ejenny Espinet dated 19th March 2008 whereby the Magistrate refused to recuse herself from conducting the joint preliminary enquiry with respect of Information's Nos 6530/05 6534/05 and 6525/05. The hearing of that substantive application was scheduled to commence on 29th April 2009. However the trial was re-scheduled due to the late filing of affidavits by the Defendant and

the request by the Claimants for an adjournment to consider those affidavits, to which the Defendants had no objection. On 29th April 2009, the Court heard instead an application for further information made by the Claimant dated and filed 28th April 2009 seeking an order to compel the Magistrate to give certain information in answer to five (5) questions listed in that application (“the Claimants’ Part 35 application.”)

- 1.2 After considering the respective submissions of the parties, I dismissed the Claimants’ Part 35 application with costs. With respect to the first four (4) requests they were dismissed on the ground that the requests were not relevant to the matters in dispute and did not satisfy the criteria set out in Part 35.2 of the Civil Proceedings Rules (“CPR”). The fifth request, although a relevant inquiry made by the Claimants, was a premature application and this was also fatal to that request.
- 1.3 The reasons for dismissing the application were provided orally at the conclusion of the submissions made by the respective parties and are now reduced into writing.

2. The Part 35 application:

- 2.1 By order of the Honourable Moosai J dated 22nd July 2008, the Claimants were granted leave to make a claim for judicial review of the said decision of the Magistrate. The reliefs sought include:
 - a declaration that the said decision of the learned Magistrate dated 19th March 2008 to refuse to recuse herself from conducting the joint preliminary enquiry in respect of the said information purportedly in accordance with the Indictable Offences (Preliminary Enquiry) Act is unlawful, null and void and of no effect;

- a declaration that the said committal proceedings are vitiated by apparent bias and accordingly are unlawful, null and void and of no effect;
- an order of certiorari quashing the said decision.

2.2 The grounds on which the claim is made is set out in paragraph 7 of the affidavit of Basdeo Panday filed on 29th July 2008 to wit: *“that the fair minded and informed observer would after ascertaining and considering the relevant circumstances adumbrated below conclude that there is a real possibility that the learned magistrate is biased”*. The allegations of apparent bias are set out in paragraphs 7 (1) to (12) inclusive of that affidavit. Several affidavits were filed in support of and in opposition to the application for judicial review.

2.3 The Claimants’ Part 35 application sought an order compelling the Magistrate to give certain information in these proceedings by providing an answer to five (5) questions namely:

“1(a) Did the First Defendant’s father(now known) to be a former MP and Minister elected to office for and on behalf of the People’s National Movement (“the PNM”) provide child maintenance for her during her childhood?

(b) If so, for what period, in what amounts and to whom were these payments made?

2(a) Was the First Defendant a recipient of a Government scholarship for her university and/or post-graduate studies when the PNM were in office?

(b) If so, (i) how did this come about and (ii) what was the value of the scholarship and what did it cover?

3(a) Has the First Defendant made an application for the post of Solicitor General with the PNM Government?

(b) If so, when was this application made and to whom was the application made?

(c) *Can a copy of the application be disclosed with copies of all correspondence relating to the said application?*

4(a) *How long has the post of Solicitor General been vacant?*

(b) *If still vacant, why has it remained vacant for this period of time?*

(c) *Is the First Defendant still a candidate for the post of Solicitor General?*

(d) *If the First Defendant is no longer a candidate, when was her application withdrawn and why?*

5. *How did the First Defendant come to be involved in the Foundation? In particular, what were the circumstances that led to the First Defendant being approached and/or herself approaching the Foundation, and then becoming a Trustee and Treasurer.”*

2.4 The grounds of the Claimants’ Part 35 application were as follows:

“1. *The claim herein alleges apparent bias by the First Defendant because of the appearance/perception of her being affiliated/aligned with the People’s National Movement, the political party in government at a time when the Claimants are being prosecuted, initially demonstrated by her involvement/participation in the Morris Marshall Foundation (“the Foundation.”)*

2. *The obligation is on the First Defendant in circumstances where apparent bias on the basis of political affiliation/alignment is alleged to be received and in the performance of her duty of full disclosure and candor, to disclose to the Honorable Court all circumstances within her personal knowledge which relate to the issue of political affiliation alignment to not limited to the circumstances relating to her involvement in the Foundation.”*

2.5 Although the parties in their submissions loosely described this request before the Court as an application seeking “disclosure”, it was, as Counsel for the Claimants confirmed at the commencement of his submissions, an application being made pursuant to Part 35 of the Civil Proceedings Rules (1998) for “Further Information.”

- 2.6 Part 35 CPR is a general and wide rule setting out the “Right of Parties to obtain information”. “Information” is not limited to the disclosure of “documents” which is the subject of Part 28 CPR as the rules themselves do not specify the nature or content of the “Part 35 request” nor limit the nature of the type of information to be obtained. Although Part 35 CPR admittedly is cast in very wide terms it is not a replacement for freedom of information legislation to obtain information generally but the entitlement to information depends on its relevance to the particular claim. The object of a “Part 35 request” is to clarify matters in dispute in the proceedings. It is a mechanism available to obtain any information from another party that is relevant to the dispute in a claim.
- 2.7 The learning suggests that “Part 35 requests” have replaced the previous mechanisms for obtaining further information under the former Rules of Supreme Court 1975 (“RSC”) by making requests for further and better particulars, and administering interrogatories. See Blackstone’s Civil Practice 2008 paragraph 30.1. It is of interest to note however that both those former methods of obtaining information hinged upon the facts and matters in dispute in the proceedings.
- 2.8 In Blackstone’s Civil Practice 2008 the editors noted at paragraph 30.1: “*The doctrine of proportionality and the more utilitarian approach to statements of case generally should mean that requests for further information should be used with some caution.*” Indeed having regard to the requirements of the CPR for parties to “fully set out” their respective cases in its Statement of Case resort to the Part 35 mechanism may be unnecessary in most cases. Further these applications may not feature in judicial review proceedings having regard to the nature of these proceedings and the principle that the Court is functioning in a supervisory role, concerned largely with matters of law and not fact. Admittedly however there are instances in which it may be necessary to investigate the facts of a case in judicial review proceedings.¹
- 2.9 Pursuant to Part 35 CPR, a party which requires information from another party about any matter in dispute in the proceedings may make a request in writing setting out precisely the nature of the information that is needed. The requesting

¹ See *Khawaja v Secretary of State for Home Department* [1983] AER 765.

party should give the other party a reasonable period within which to respond. If the party fails to respond or to provide the requested information then an application can be made to the Court by the requesting party to compel the other party to provide the requested information. Such an application for an order compelling a reply to a request for information may not be made before the time for serving witness statement has expired nor less than 42 days before the date fixed for the trial. See Part 35.3 CPR.²

- 2.10 The information sought from another party pursuant to a “Part 35 request” must therefore be “*about any matter which is in dispute in the proceedings.*” See Part 35.1 (1) CPR. The issue of relevance and the identification of the dispute in the proceedings is therefore a threshold question to be considered by the Court in its approach to these requests.³ In ***West London Pipeline Storage Limited v Total UK Limited*** [2008] EWHC 1296 (Comm.) the first and second Defendants made an application for information and disclosure in respect of insurance arrangements of the Third Party in the proceedings. The application was advanced on two bases, that the material was relevant to the issues and/or the material is necessary from the perspective of efficient case management. The third party contended that the information as to the insurance position of the party was not directly relevant to “any matter which his in dispute in the proceedings” within CPR Part 18. Mr. Justice David Steel stated:

“It appeared to be common ground that the insurance policies were not disclosable under CPR Part 31 whether as part of standard disclosure of otherwise. They do not support or adversely affect any party’s case, they are not relevant to the issues nor do they constitute documents which may lead to a train of inquiry enabling a party to advance his own case or damage his opponent’s. By the same token it is difficult to see how information furnished under CPR Part 18 would relate to any matter which is in dispute in the proceedings.”

² Nothing turns in this case on an interpretation of Part 35.3 and no arguments were canvassed on the time limits for making this application

³ See *West London Pipeline and Storage Limited v Total UK Limited* [2008] AER (D) 94.

- 2.11 However the question of whether the information requested is relevant to the matters in dispute is not the only hurdle for applicants who avail themselves of “Part 35 requests.” Even though the request may be related to any matter “which is in dispute in the proceedings”, Part 35.2 CPR sets out general rules which will govern the exercise of the Court’s discretion in determining whether to make an order.
- 2.12 The meaning of Part 35.2 CPR is plain and unambiguous. It requires no further gloss in interpretation. In determining whether an order to compel a party to provide information in response to a “Part 35 request” is to be made, the Court is required to make an assessment of the following matters:
- (a) Whether the order is necessary in order to dispose fairly of the claim or to save costs. The word “necessary” in Part 35.2(2) CPR suggests a stringent test is to be applied and that there must be a compelling reason to make the order. Disposing “fairly” of a claim will also take into account considerations such as the threshold question as to whether the request relates to matters in dispute and calls for a judgment on the resolution of the dispute.
 - (b) Whether there is a likely benefit to be derived in giving the information.
 - (c) The costs of providing the information.
 - (d) Whether the financial resources of the party who is asked to provide the information is sufficient to enable it to comply with the order. The consideration as to costs reflects the concerns of dealing with cases justly in a manner that is proportionate to the financial position of each party.
- 2.13 It is noteworthy that the considerations set out in Part 35.2 CPR in a large measure, mirror the considerations that is taken into account in giving effect to the overriding objective. See Part 1.1 (2) CPR. This demonstrates that the principles of the overriding objective are infused in the considerations set out in Part 35.2 CPR when the Court is asked to make this judgment call on making an order for further information in proceedings. The entire scheme of Part 35 CPR accordingly underscores the role of the Court in the management of a case and in furthering

the overriding objective of the Civil Procedure Rules in managing a case by controlling the issues and the evidence to be presented.

- 2.14 Some instances where Part 35 requests will not be allowed include where they go to cross examination as to credit, where they are merely fishing expeditions by parties seeking to find a case which has not been pleaded or to obtain evidence to use in subsequent proceedings. See paragraph 18.1.2 Volume 1 Supreme Court Practice 2005. This is by no means an exhaustive list but illustrative of the application of the principles set out in Parts 35.1 and 35.2 CPR. Ultimately each application is to be adjudged against the backdrop of its own facts.

3. The matters in dispute in the proceedings:

- 3.1 Whether the Claimants' request is relevant to matters in dispute in the proceedings is the threshold question in the Claimants' Part 35 application. The matters or issues in dispute in these proceedings can be gleaned from a reading of the Claimant's Application for leave, their Claim form and the affidavits filed in these proceedings.
- 3.2 The dispute in this case is whether the decision made by the Magistrate is null and void on the ground of apparent bias. However the allegation of apparent bias made by the Claimants' is not by any means wide nor open ended but it is an allegation that is pegged squarely on the grounds set out in the Claim and in particular paragraphs 7(1) (12)-(19) of the Claim.
- 3.3 The material portions of the Basdeo Panday affidavit filed on 27th July 2008 reads as follows:

“ 7. Shortly before 12th February 2008 ...the claimants received information that the learned magistrate was a trustee of and the treasure of an organization named the Morris Marshall Development Foundation (“The Foundation”) situate at the corner of St Barbs and Laventille Roads, Laventille. The learned magistrate had never disclosed her involvement in the Foundation to any other parties before her in these committal proceedings.....

14. The foundation discriminates in the provision by it of assistance to members of the Laventille community by requesting through its personnel whether persons seeking assistance are PNM members, and refusing assistance if they are not.

15. The Foundation has permitted the use of its premises and personnel for purely and obvious political purposes, e.g. in the 2007 General Election, the premises and personnel of the Foundation were employed to assist in the PNM campaign in the constituency of Laventille West.

16. The learned magistrate is accordingly connected to and involved in a voluntary association, which, while ostensibly charitable in nature, is intimately connected to the PNM and used by the PNM for the provision of social assistance to its supporters and for electoral campaigning.

17. It may reasonably be inferred that the learned magistrate is and was by virtue of her involvement in the Foundation in communication and or in contact with PNM supporters and sympathizers, including the said John Jeremie and the said Martin Joseph, the former of which was Attorney General when the said Informations were sworn.

19. The fair indeed and informed observe will likely conclude that the learned magistrate has by her involvement in the Foundation, having regard to the political sensitivity of the particular prosecution of the Claimants' by the said Informations, an interest in the committal proceedings over which she presides."

- 3.4 Counsel for the Claimants' contended that the requested information was material to their claim against the Magistrate of apparent bias as it will demonstrate her political affiliation to the PNM. However, the Claimants' claim does not make out such a general case of political affiliation/alignment by the Magistrate to the "PNM". The material in these proceedings demonstrate that the case for the

- Claimants is based upon the Magistrate's association with the Morris Marshall Foundation.
- 3.5 Counsel for the Claimant referred the Court to paragraph 6(1) and paragraph 6(21) of the Claim as making out an open-ended allegation of apparent bias based on her political affiliation to the PNM. However, neither of these paragraphs of the Claim makes any such wide allegation nor provides any support for Counsel's submission.
- 3.6 The Claim as it is presently formulated makes a case of apparent bias on the ground of the Magistrate's affiliation with an organization known, as the Morris Marshall Foundation. It is alleged by the Claimant that this institution is a PNM institution. This has been denied by the Defendant. It is the Magistrate's links to that organization which form the basis of the Claimant's claim of apparent bias and is the dispute in these proceedings. All the affidavits filed in this case relate to this association with the Foundation and its operations. Any questions or requests for information must therefore relate to that controversy or dispute.
- 3.7 Questions 1 to 4 inclusive of the request therefore are not relevant to the matters in dispute in the proceedings. Whether the Defendant's father provided child maintenance for her during her childhood, whether the Defendant was a recipient of a government scholarship, whether the Defendant made an application to the post of Solicitor General or whether that post is still vacant are simply not matters that fairly relate to any dispute as disclosed from the proceedings in this case. They do not seek to clarify any matter which is central to the contest between the parties, that is the association between the Magistrate and the Morris Marshall Foundation.

4. Part 35.2 considerations:

- 4.1 An order as requested by the Claimants is not necessary to dispose fairly of the claim or to save costs. An order to compel the Defendant to respond to these requests cannot dispose fairly of the claim as identified by the Claimant on its "pleadings". The Court has already observed the irrelevance of the questions to

- the claim and the matters that are in dispute in these proceedings. It cannot therefore be said that an order is necessary to fairly dispose of this claim.
- 4.2 Further the claim is far advanced having been set down for trial on two separate occasions. To accede to a request such as this at this stage is tantamount to enlarging the dispute and redefining the controversies in dispute in the proceedings in the absence of an amendment to the proceedings. Further it is noted that this is an application for judicial review in which leave of the Court was sought and obtained on the basis of the allegation of apparent bias as framed in the Claimant's application for leave not on an open allegation of political affiliation/alignment with the PNM. To enlarge the dispute at this stage in this manner cannot as a consequence be a cost saving exercise as the pleadings will have to be amended, and further affidavits filed to deal with these new issues.
- 4.3 Further, the answers to these questions will not assist the Court or benefit the Claimants in making their case for relief. Even if the Defendant was compelled to provide the answers to these questions it takes the Claimants' case no further. In any event, in the context of the Claimants' case it is difficult to say how these questions on parental maintenance; further education in the national education system and making an application for employment can advance a claim of political affiliation/alignment in these proceedings. The Court agrees with the submissions of Senior Counsel for the Defendant that the request is tenuous, speculative and very much a fishing expedition which the Court will not countenance.
- 4.4 The Court also observed that some of the questions namely questions two (2) and four (4) might have been directed to the wrong party and the Defendant is not competent to provide facts, quite apart from venturing her opinion, to answer those questions.
- 4.5 Even though both parties agreed that the financial resources of the Defendant are sufficient to provide the information and the likely costs of giving the information are not material this by no means translates into an automatic order in favor of the Claimants for the provision of the information. The Court still must have regard to the factors identified above.

5. The Fifth question:

- 5.1 This question does not suffer the fatal flaw of irrelevance as do questions 1 to 4. Senior Counsel for the Defendant indicated that he would encourage his client to respond to this question as he conceded its relevance. That being said however the Court could not grant an order to produce this information as this request was made prematurely.
- 5.2 The Claimants' letter seeking this information was received by the Defendant on 29th April 2009 the day the application was made. Part 35.2 (1) is clear in its terms: "If a party does not give information which another party has requested under rule 35.1 within a reasonable time, the party who served the request may apply for an order compelling him to do so". It cannot be said therefore that this Defendant did not give information in response to question five (5) within a reasonable time having only seen the request on the very day that the Claimant made its application for an order compelling her to give the information. This request is therefore premature.

6. The duty to co-operate:

- 6.1 In passing the Court notes that Counsel for the Claimant observed that the parties have generally been co-operative in sharing information. The Court commends both parties for adopting this approach. Indeed the duty of litigants to co-operate with one another in the preparation of a case for trial underlies the ethos and spirit of the CPR. Part 1.3 CPR states: "Parties are required to help the Court to further the overriding objective." Part 25.1 (d) CPR the Court in furthering the overriding objective of the rules may encourage the parties to co-operate with each other in the conduct of proceedings."
- 6.2 Short of issues that may give rise to contention such as relevance as occurred in this case, generally there should be no objection to the sharing of information between parties consistent with the "cards on the tables" approach to litigation. This should be done consensually as far as possible and the Court will be astute to encourage the parties to conduct its litigation in this manner. It is with this co-

operation of the parties and their legal representatives in the conduct of proceedings that cases can be effectively and expeditiously managed and dealt with justly.

7. Costs

- 7.1 The Claimants having failed in its bid to obtain the requested information, the Court ordered that the Claimants' pay the Defendants the costs of this application. Such costs are to be assessed at the end of the hearing of the substantive application for judicial review.

Dated: April 29, 2009

Vasheist Kokaram
Judge

APPENDIX

PART 35

Right of parties to obtain information

- 35.1 (1) This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.⁴
- (2) To do so he must serve a request for information that he wants on that other party.
- (3) He must state in his request precisely what information he wants.

Orders compelling reply to request for information:

- 35.2 (1) If a party does not give information which another party has requested under rule 35.1 within a reasonable time, the party who served the request may apply for an order compelling him to do so.
- (2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.
- (3) When considering whether to make an order the court must have regard –
- (a) to the likely benefit which will result if the information is given; and
 - (b) to the likely cost of giving it; and
 - (c) To whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order.”

⁴ In contrast see Part 18.1 of the CPR (UK) “The Court may at any time order a party to (a) clarify any matter which is in dispute in the proceedings or...whether or not the matter is contained or referred to in a statement of case.”

Time limits for compelling reply

35.3 An application for an order compelling a reply to a request for information may not be made before the time for serving witness statements has expired nor less than 42 days before the date fixed for trial.

(The time for serving witness statements will be specified in Directions given by the court under Part 27)

Information obtained under Part 35 not to be used in other proceedings

35.4 A party may use information which he obtains-

- (a) in response to a request under rule 35.1; or
 - (b) in compliance with an order under rule 35.2
- only for the purpose of the proceedings in which the request or order was made.