THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV2018-03189

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW OF THE DECISION MADE BY THE ZOOLOGICAL SOCIETY OF TRINIDAD AND TOBAGO THAT THE ZOOLOGICAL SOCIETY IS NOT "PUBLIC AUTHORITY" WITHIN THE MEANING OF THE FREEDOM OF INFORMATION ACT

BETWEEN

MAHASE DASS

Applicant/Intended Claimant

AND

THE ZOOLOGICAL SOCIETY OF TRINIDAD AND TOBAGO

Intended Respondent/ Intended Defendant

Before the Honourable Mr Justice Frank Seepersad

Date of Delivery: November 22, 2018

Appearances:

1. Mr A. Ramlogan SC, Mr G Ramdeen instructed by Mr A. Pariagsingh and Ms A. Rambaran for the Claimant.
2. Mr J. Junkere for the Intended Respondent.

RULING

Introduction

1. The Applicant filed an application for leave to institute a claim for judicial review and by virtue of affidavits filed on September 26, 2018 the Intended Respondent objected to the grant of leave and outlined inter alia that the Intended Respondent is not a proper party, that there was delay and that there existed an alternative remedy. The specific claims advanced by the Applicant are as follows:

    i. Time be extended for the filing of this application;

    ii. Leave be and is hereby granted to apply for judicial review;

    iii. An order certiorari to remove into this Honourable Court and quash the decision of the Zoological Society of Trinidad and Tobago as set out in the letter dated January 22, 2018 and that the Zoological Society of Trinidad and Tobago is not a public authority that is subject to the Freedom of Information Act 1999;

    iv. A declaration that the Zoological Society of Trinidad and Tobago is a "Public Authority" within the meaning of and as defined by Section 4 of the Freedom of Information Act 1999 and is therefore subject to the said Act;

    v. An order of mandamus to compel the Zoological Society of Trinidad and Tobago to consider the Applicant/Intended Claimant's FOIA application dated January 5, 2018 in accordance with the provision of the FOIA within 7 days;

    vi. An order of mandamus to compel the Zoological Society of Trinidad and Tobago to provide the information requested pursuant to the Proposed Applicant/Claimant's FOIA application dated January 5, 2018 within 7 days;

vii. Costs;

viii. Such further orders, directions or writs as the Honourable Court considers just as the circumstances of this case warrants pursuant to section 8(1)(d) of the Judicial Review Act 2000 (as amended).

2. In its consideration as to whether leave should be granted, the Court considered the approach outlined in **Sharma v Brown-Antoine [2006] UKPC 57** where at page 7, paragraph 4, the Board articulated the relevant test for the grant of leave as follows:

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

3. The Court also noted the approach adopted by the Court of Appeal in **Steve Ferguson and Another v The Attorney General of Trinidad and Tobago Civ App No. 207 of 2010** where the Court held that:

> *Per Mendonca JA:*
>
> "7. Before discussing these grounds it is important to emphasize that this is an appeal from the refusal of leave to apply for judicial review. It is not an appeal from the final determination of the matter after a full hearing. The hurdle that the Appellants must overcome is not a very high one. What the Appellants need to show in order to obtain leave is an arguable ground for judicial review

having a realistic prospect of success and there is no discretionary bar such as delay or an alternative remedy (see Privy Council Appeal No.75 of 2006 Sharma v Antoine). In this appeal no arguments have been advanced that there is any discretionary bar that is fatal to the grant of leave so that the question is whether the Appellants have established an arguable ground of appeal for judicial review having a realistic prospect of success. If so, then leave should have been granted. If not, the judge was correct to refuse leave.

[…]

71. In my judgment the three grounds advanced in the Court below are arguable grounds for judicial review that have a realistic prospect of success. The Judge was therefore wrong to refuse the application for leave to apply for judicial review.

Per Kangaloo JA:

1. I have read the judgment of Mendonça J.A. and am in agreement with it and the order that he proposes. However I would wish to make a few observations which I believe will assist the future development of the law of judicial review in this jurisdiction. I have already made some suggestions about the procedure in judicial review previously.

[…]

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 meddlesome 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."

4. The Applicant's claim is premised upon provisions of the Freedom of Information Act 1999 (FOIA) and the Court considered and noted that in its interpretation of the Act, it should adopt a purposive approach and formed

the view that the aim, object and purpose of the Act is firmly rooted in granting general access to official documents in the possession of public authorities. Section 11 of the FOIA establishes a general right of access to documents and information and section 3 makes it clear that the object of the FOIA is "to extend the right of members of the public to access information" and contains an inherent bias in favour of disclosure by providing that the Act shall be interpreted as far as possible so as to "facilitate and promote promptly and at the lowest reasonable cost the disclosure of information."

5. The Court of Appeal in **The Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry Civ App No. P200/2014** confirmed the need for a broad purposive approach. In considering the constitutionality and need for public participation incorporated into the FOIA, Jamadar JA noted:

> "In my opinion therefore, the core constitutional value of public participation in the 'institutions of the national life' so as to 'develop and maintain due respect for lawfully constituted authority' (stated at clause (c) of the Preamble), bolstered by the constitutional commitment to 'freedom … founded on respect for … the rule of law' (stated at clause (d) of the Preamble), is a legitimate constitutional lens through which the issues before this court should be viewed and analysed."

6. His Lordship stated that section 3(2) of the FOIA gave rise to a general presumption in favour of disclosure. This right of access conferred by the FOIA as against the backdrop of the Constitution in the learned judge's analysis was summarised at paragraph 22 as follows:

"This objective of a presumptive general right to information, is to be "limited only by exemptions and exemptions necessary for the protection of essential public interests …""

7. The Court considered the Applicant's claim and the issue as to whether the Intended Respondent acted lawfully had to be considered against the dicta by Jamadar JA in the Ministry of Planning case (supra).

8. The first issue to which this Court addressed its mind to was whether or not the Intended Respondent is a proper party. The Intended Respondent contended in its application objecting to leave that it is not a public authority as it does not perform any governmental functions on behalf of the State and is not subject to government interference or control. The government of Trinidad and Tobago Freedom of Information Unit which is formed to oversee the operation of the FOIA lists the Intended Respondent as one of the public authorities to which the Act is applicable. Further, the Intended Respondent is listed as under the purview of the Ministry of Agriculture, Land and Fisheries. The Applicant argued that the State has treated the Zoological Society as a public authority and submitted that in Volume 45 of the Trinidad and Tobago Gazette published on June 28, 2006 for example, the government published a statement under section 7 of the FOIA confirming that the Zoological Society is a public authority subject to the FOIA.

9. The aforementioned gazette publication at 7(1)(a)(i) and section 4(k) of the FOIA provide as follows:

"Section 7 (1) (a) (i)

Function and structure of the Zoological Society of Trinidad & Tobago

Mission Statement:

The Zoological Society of Trinidad & Tobago is committed to the promotion and maintenance of a naturalistic, vibrant setting where people commune with indigenous and exotic flora and fauna and participate in a unique and challenging education and entertaining experience.

The Zoological Society of Trinidad & Tobago is a Statutory Body. The Zoological Society of Trinidad & Tobago was established by and Act of Parliament, Act 12 of 1952. […]

Effect of functions on members of the public through the operation of the Emperor Valley Zoo the Society assists in educating and sensitizing the public on the importance of environmental conservation to protect habitats and animal species from extinction. The organisation also provides information on animals and animal husbandry to the public."

Section 4(k) FOIA:

"(k) a body corporate or unincorporated entity—

(i) in relation to any function which it exercises on behalf of the State;

(ii) which is established by virtue of the President's prerogative, by a Minister of Government in his capacity as such or by another public authority; or

(iii) which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control;

"responsible Minister", in relation to a public authority, means—

(a) the Minister of Government to whom responsibility for the public authority is assigned; or

(b) such Minister of Government as the President may, by Order, declare to be the responsible Minister of the public authority for the purposes of this Act;"

10. The Applicant further submitted that the Zoological Society is a body corporate which is established by an Act of Parliament: The ZSTT Ordinance No. 12 of 1952: Zoological Society of Trinidad and Tobago (Incorporation) an Ordinance for the Incorporation of Certain Persons as Trustees of the Zoological Society of Trinidad and Tobago-5th April 1952 states that:

> "Whereas there has been established in the Colony a Society known as the Zoological Society of Trinidad and Tobago"

It is the Applicant's view that the ZSTT was enacted as a public authority by the Governor of Trinidad and Tobago with the advice of the Legislative Council.

11. It was argued that the ZSTT is responsible for the management and control of the only national zoo and it exclusively performs functions on behalf of the State such as: founding and operation of a Zoological Park with a collection of flora and fauna, advancement of Zoology and Animal Physiology, animal conservation, education and training workshops locally and internationally for staff, public education and public awareness of animals, emergency response for rescue, rehabilitation and release of wild life throughout the country and networking with local and international organisations.

12. The Applicant further outlined that the functions of the Zoological Society of Trinidad and Tobago are in the realm of public functions. According to its website it includes:

    1. The establishment of zoological gardens for the advancement of zoology
    2. The introduction into the island of new and interesting objects of the animal kingdom
    3. The development of greater interest in zoology in the youth of the island
    4. The raising of funds for the purpose of carrying out these objectives

13. The Intended Respondent argued that:

    It does not fall within this definition and is therefore not a public authority for the following reasons:

    i. Contrary to the uninformed (yet understandable) view of the average layperson, the Emperor Valley Zoo (EVZ) is *not* a state-owned entity. As such, its governing body, the Zoological Society of Trinidad and Tobago (the ZSTT) does *not* exercise any function on behalf of the State. It is a private organisation, which is not subject to government interference or control. It manages and operates the EVZ at the behest of its private membership. It performs no governmental function and does not qualify as a "public authority" under this head.

    ii. The ZSTT is a body corporate established by the **Private Ordinance No. 12 of 1952**. The salient provisions of this Ordinance are as follows:

> "3. (1) The Incorporated Trustees shall… have full power to acquire, purchase, transfer, donation (sic), exchange, devise, bequest, grant, gift, conveyance (sic) or otherwise, any real property in the Colony or estate or interest therein.
> 4. The objects of the Society shall be-
> (a) the founding and operation of a Zoological Park… with a representative collection of its fauna, and the introduction… of new and curious objects of the animal kingdom.
> (b) the advancement of Zoology and Animal Physiology and it shall be lawful for the Incorporated Trustees to do all acts and things including the raising of funds for the purpose of carrying out the said objects or any of them."

14. The Intended Respondent further submitted that it is evident that the Trustees of the ZSTT own the land on which the EVZ's estate operates. It is primarily a private organisation. Its Board of Trustees is elected primarily from amongst its membership, it is not subject to either government appointment or interference and it was not established by virtue of the President's prerogative, by any Minister of Government or by any other public authority.

15. It was submitted that the ZSTT's members pay a yearly subscription and it is obliged and empowered to raise funds to meet its expenses. The ZSTT's traditional fund-raising ventures (soliciting donations from corporate entities, receiving donations from external zoological organisations and generating gate receipts from visitors) are almost always insufficient to manage the financial obligations of the EVZ. The ZSTT petitions the Government of the Republic of Trinidad and Tobago (the GoRTT) for additional funding to offset its expenditure in the same manner that it solicits funding from private entities

and parallel international organisations. Subventions are received by the ZSTT to meet any shortfalls in operating expenses; however, unlike public authorities, the ZSTT is not mandated to deposit its earnings or the receipt of other funds into the Consolidated Fund.

16. The Intended Respondent advanced that the provisions of FOIA are meant to be taken conjunctively and not separately and so to qualify as a public authority, the ZSTT must both receive Government funding and be subject to government control and in the absence of any evidence of government control of the ZSTT, the Court ought to reasonably conclude that the ZSTT does not fall within the definition of a public authority.

17. It was further argued that the ZSTT is distinguishable from *bona fide* public authorities such as the Prison Service (to whom the Applicant likened the Intended Respondent) since those bodies conduct a State function. The Intended Respondent submitted that the establishment, management and operation of a zoo are not State functions and the Applicant has not adduced any evidence in its application that the ZSTT does perform a State function. Further, the ZSTT is not accountable to any ministry or state entity or authority and as such, the Intendent Respondent cannot be deemed to be under any governmental control.

18. The Court considered the case of **Yukon Medical Council v Information and Privacy Commission [2002] YKCA 14** and **Chandresh Sharma v The Integrity Commission HCA No. CV S2005 of 2004** where the Court was asked to determine the question of whether the Integrity Commission is a public authority within the meaning of the FOIA. Jamadar J, as he then was, considered section 4(k) of the FOIA- "A body corporate or unincorporated entity in relation to any function which it exercises on behalf of the State." The Court found that the function of the Integrity Commission, the receipt of

declarations and statements of registrable interests is carried out on behalf of and for the benefit of the people of Trinidad and Tobago.

19. The Court held that given the object and intention of the FOIA and the "interpretative lens" prescribed by it at section 3(2), the correct approach to determining what is a public authority for the purposes of the FOIA is a permissive and not restrictive one. It was held that the Integrity Commission is a public authority within the meaning of section 4(k) of the FOIA and the failure to have a "responsible Minister" for the Integrity Commission, the individual to whom requests for FOIA disclosures are to be made under section 13(5) did not prevent a request from being made directly to the Commission.

20. This Court therefore considered the functions of the zoo and found that there is merit in the argument that these functions are exercised for and on behalf of and for the benefit of the citizens of Trinidad and Tobago. The evidence suggests that the ZSTT is in part, financially dependent on the government and the Court noted that notwithstanding the arguments advanced that the ZSTT is an independent body separate and apart from the government, the independence of the organisation may not necessarily exclude it from being viewed as a public body. Accordingly, this Court, at this stage, is of the view that the Applicant's position that the ZSTT is a public body within the meaning of the Act is not devoid of merit and is an argument which is clothed with a realistic prospect of success.

21. The Court next considered the issue of delay and addressed its mind to section 11 of the Judicial Review Act Chap 7:08 and Part 56.5 of the Civil Proceedings Rules 1998 (as amended). The Court also considered the dicta of the Privy Council in **Fisherman and Friends of the Sea v The Environmental Management Authority and Others [2018] UKPC 24** and noted that Lord

Carnwath considered the apparent conflict between Rule 56.5 and section 11 and held that:

> "in so far as there are differences, the Judicial Review Act must prevail over the Rules. It is important to emphasise that there is a duty to act "promptly" regardless of the three-month limit. It seems also that the purpose of that specific limit is to provide a degree of certainty to those affected, and accordingly that strong reasons are needed to justify extending it where other interests, public or private, are involved. It is also clear that the discretion under section 11(1) is that of the trial judge, with which an appellate court will only interfere if it finds some flaw in his reasoning (see Fishermen and Friends of the Sea v Environmental Management Authority [2005] UKPC 32)."

22. This Court recognised that there is a conflict with respect to the approach taken by the Court in **Abzal Mohammed v Police Service Commission, Civ App No 53 of 2009** and **Devant Maharaj v National Energy Corporation of Trinidad and Tobago, Civ App No 115 of 2011** and is of the view that that in the absence of a resolution of the difference by the Privy Council, it is inclined to adopt the approach of Bereaux JA in Devant Maharaj (supra). Accordingly, the Court should approach the issue of delay guided by the dica of Bereaux JA who said as follows:

> "[7] There is no conflict between section 11(1) and (2) and Part 56.5(1) and (3). Rather, the combined effect of section 11(1) and CPR 56.5(1) and (3) may be summarised as raising three issues for the judge:
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> (i) Whether the application was filed promptly.
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> (ii) If the application was not prompt whether there is good reason to extend the time. If there is no good reason to

extend the time, leave to apply for judicial review will be refused for lack of promptitude.

(iii) If however, there is good reason to extend the time, whether permission should still be refused on the ground that the grant of the remedy would likely cause substantial hardship or substantial prejudice to a third party, or would be detrimental to good administration."

23. The Court also recognised that a significant feature in the Fisherman and Friends case (supra) was the fact that the matter surrounded a point of public importance in so far as it was outlined that there had been significant expenditure and the matter involved policy considerations. On the facts of Abzal Mohammed, while there is no issue of expenditure or policy consideration, the very nature of the administrative action, resulted in a circumstance where the public interest was paramount, as due process, fairness, clarity and certainty of approach in the discharge of public functions, are vital for the efficient discharge of good administration.

24. On the facts before this Court, the application was not filed promptly and there was a protracted time period between the filing of this action and the date on which the relevant circumstances first arose as at June 2014. Even if the timeline is circumvented and the reviewable decision is that which was contained in the ZSTT's letter dated January 22, 2018 (which it is alleged was received on January 31, 2018), then the relevant timeline commenced from January 31, 2018 and any application for leave ought to have been filed within three months and so the instant application is still outside of the said period.

25. In a democracy, the vindication of the rule of law especially as it is referable to the review of administrative decisions, is paramount, but the legislature

in its wisdom, by virtue of the Judicial Review Act Chap 7:08, elected to include a specific time limit (i.e. limitation period) and the objective intent of such an inclusion must have been to provide clarity and certainty as to the period of time within which a decision may be challenged.

26. Where an application has not been filed promptly, and not within the determined time period, the Court under section 11(1) of the Judicial Review Act must consider whether there is good reason to extend time.

27. The Court considered the matters articulated by the Applicant as hereinafter outlined:

    i. The extensions granted to the State;
    ii. The impasse between the statutory authority service commission and the Zoological Society of Trinidad and Tobago;
    iii. The intervening Court vacation and the unavailability of counsel; and
    iv. The alleged impecuniosity of the Intended Claimant.

28. The Court having considered the aforementioned, formed the view that no good explanation and/or reason was advanced for the lack of promptitude in relation to the institution of a Judicial Review claim and accordingly, leave to apply for judicial review should not be granted.

29. The Court found that the matters and explanations advanced by the Applicant were not germane to the issues which fell to be determined as between the Applicant and the Intended Respondent and in particular, found that the arguments as to the Court vacation and the availability of counsel as well as the impecuniosity of the Applicant were devoid of merit and could not be used

to circumvent the certainty of the time period imposed by section 11 of the Judicial Review Act.

30. In its determination as to whether good reason existed, the Court considered issues of context and circumstance, having regard to the factual matrix before it and it was mindful that a balancing exercise should be engaged. The Court considered that in its determination as to what amounts to good reasons it should consider *inter alia:*

i. The length of the delay;

ii. The reason for the delay;

iii. The prospect of success;

iv. The importance of the issues involved in the challenge.

v. The overriding need to ensure that justice is done.

31. Although the issues of hardship and prejudice are germane to the determination as to whether time should be extended, in its assessment as to whether there exists good reason to extend the time these factors should also be borne in mind.

32. This Court also addressed its mind to the issue as to whether time should be extended in the event that its assessment as to the existence of good reason is found to be erroneous. The Court therefore frontally considered the issues of hardship, prejudice and detriment to the public interest and the strengths and weaknesses of the case advanced by the Applicant and was resolute in its conviction that an extension of time would be inappropriate. The Court recognised that there is the need for judicial clarity as to whether the ZSTT is subject to the provisions of the FOIA. However, the delay on the facts of this case militated against the granting of leave, which, if it were to have been granted, would violate the protection afforded to the Intended Respondent under section 11 of the Judicial Review Act.

33. Consequently, the Applicant's application must be and is hereby dismissed and the parties shall be heard on the issue of costs.

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FRANK SEEPERSAD

JUDGE