

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil App. No. 242 of 2020**

**CV2019-05288**

**BETWEEN**

**The Commissioner of Police**

Appellant

**AND**

**Denyse Renne**

Respondent

**IN CHAMBERS**

**BEFORE:**

A. Yorke-Soo Hon, J.A.

**APPEARANCES:**

Mr Reginal T.A. Armour, SC, Ms Vanessa Gopual and Ms Chinara Harewood for the  
Appellant

Mr Rumeal M. Peters for the Respondent

**DATE OF DELIVERY:** February 3, 2021.

## JUDGMENT

### BACKGROUND

- [1]. This application is made by the Commissioner of Police, (“the appellant”) for a stay of execution of the trial judge’s order that the appellant provide certain information to Denyse Renne (“the respondent”) who is an investigative journalist.<sup>1</sup> Under the **Freedom of Information Act, Chp 22:02 (“FOIA”)** requests were made by the respondent to the appellant on October 3, 2019. By letter dated November 26, 2019, the appellant, sought to provide some of the information requested whilst the remaining requests were denied either because they were considered as exempted under the FOIA or that it was impractical for same to be provided. As a result, the respondent filed judicial review proceedings against the appellant. On September 2, 2019, the trial judge ordered that the appellant provide some of the information which was previously denied.

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<sup>1</sup> The terms of the order includes that the appellant provide to the respondent the following by September 11, 2020:

- (1) a. The mechanisms used, other than criteria, to identify which retired police officers returned to the Police Service between August 2018 and the date of the freedom of information request.
  - b. The categories of persons, as may be gleaned from the occupations stated on the application forms of persons, who were granted Firearms Users’ Licences from August 2018 to the date of the request.
  - c. The names of all returning police officers except those who were returned for the purposes of conducting covert, intelligence services from August 2018 to the date of the request.
  - d. The total or collective salaries of all the persons who have been returned as police officers from August 2018 to the date of the request
  - e. The names of all retired Defence Force members except those who were retained for the purpose of conducting covert intelligence services and a list by letter or number of all persons hired, the rank given, and the salary paid to them.
  - f. The names of all contractors / suppliers retained by the police service for the period August 2018 to the date of the request and the cost of the services.
  - g. A list of all advertisements by the police service for the procurement of goods and services from August 2018 to the date of the request.
  - h. The names of all external attorneys retained by the police service to attend to civil matters and the cost of services for the period August 2018 to the date of request
- (2) Cost to be paid by the appellant

A. GOOD PROSPECTS OF SUCCESS

**SUBMISSIONS BY THE APPELLANT**

[2]. Counsel for the appellant argued that a stay should be granted because the appeal has a good prospect of success and submitted as follows:

*(i). Jurisdictional Error*

[3]. (a). On the plain meaning of **sections 4 (k) (i), 13 (5) and 22 (2) of the FOIA**, any requests made to access any FOIA documents under **section 4 (k) (i) of the FOIA** ought to be made to the Minister ordinarily responsible for the Trinidad and Tobago Police Service (“TTPS”), that is the Minister of National Security (**The Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v The Honourable Minister of Finance**<sup>2</sup>). Any judicial review application brought to challenge the decision of a public authority falling under **section 4 (k) (i) of the FOIA** ought to be brought against the responsible Minister and not the appellant. Therefore the respondent’s FOIA requests were made to the wrong party and the respondent also sued the wrong party.

(b). It was also submitted that the court’s jurisdiction to order a public authority to disclose documents under the FOIA is not an inherent jurisdiction but rather one created by parliament which did not place the responsibility on the appellant to provide the requested information. The court below therefore erred in imposing such a duty on the appellant when he was under no such lawful obligation.

(c). Any substitution of the Minister of National Security as a party at this stage would be prejudicial since a judgment would have already been entered against him, he not having an opportunity to be heard.

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<sup>2</sup> Civ App No. 123 of 2004.

*(ii). Unsupported findings*

- [4]. Counsel submitted that the trial judge wrongly made assumptions about the operations and/reporting and record-keeping capabilities of the TTPS. These assumptions were: (a) it would be strange if the TTPS had hired former officers from August 2018 to October 2019 only for covert intelligence operations, and (b) the TTPS' reporting requirements to the Ministry on its expenditure meant that it should have available the names of the contractors retained for the period August 2018 to October 2019, the date of each retainer and the cost of the services. Based on these assumptions, the trial judge concluded that (a) the TTPS was being untruthful about the hiring of former officers for covert intelligence operations only when it must have hired them for other purposes as well, and (b) the reporting requirements of the TTPS were more than sufficient to satisfactorily meet the respondent's requests. It was submitted that in light of the absence of cross-examination and/or other evidence which could have cast doubt on its truthfulness, the trial judge was wrong to reject the reasons advanced by the TTPS for not disclosing the requested information.

*(iii). Failure to consider relevant material*

- [5]. Counsel contended that the trial judge failed to consider the following:
- (a). The TTPS invited the respondent pursuant to section 21 (6) of the FOIA to make her request in a more specific form but there was no evidence that she complied;
  - (b). The disclosure of the rank of former defence force officers within the service and/ or their remuneration packages could result in their identification and jeopardize their safety and the safety of others under covert intelligence operations;
  - (c). The respondent was seeking an itemization of the fees paid to each attorney and such disclosure of personal information was unreasonable in light of the country's current crime situation;

- (d). The time frame for the disclosure of personal information did not give the TTPS and affected persons an adequate opportunity to engage in the due process requirements under section 30 of the FOIA.

#### **SUBMISSIONS BY THE RESPONDENT**

- [6]. Counsel for the respondent argued that a stay is not warranted because the appellant has no realistic prospects of success for the following reasons.

*(i). Jurisdictional Error*

- [7]. (a) By alleging that the respondent sued the wrong party the appellant was now raising a new ground for the refusal to grant the information requested (**The Ministry of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry**<sup>3</sup> and **Ashford Sankar v Public Service Commission**<sup>4</sup>). Further, since the appellant had not complied with the obligation under section 23 of the FOIA to state the grounds for his refusal within 30 days then he ought not to be allowed to raise a new ground at this stage. The appellant was also unable to satisfy the court that the new ground will assist the court in dealing with the matter justly.

(b) The TTPS is a public authority headed by the appellant under **section 4 of the FOIA**. In compliance with section 7, 8 and 9 of the FOIA the office of the appellant issued a statement entitled "*Government of the Republic of Trinidad and Tobago Public Statement of the Trinidad and Tobago Police Service*" which named the appellant as the decision-maker for providing or withholding information under the Act. He is responsible for all the divisions and departments of the TTPS. The appellant has historically attempted to publicly comply with the provisions of the Act and therefore he is the correct party to be sued.

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<sup>3</sup> Civ App P200/2014

<sup>4</sup> Claim No. CV2006-00037 C.A. No 58 of 2007

(c) The appellant has stated through his attorneys in open court that his office is an independent entity with no obligation to any government Minister. Counsel submitted that since he did not report to any government Minister, he presumably reports to the government itself. Alternatively, if the appellant did not report directly to the government he reports to the Police Service Commission, a public authority vested with the power to appoint or dismiss him. The Police Service Commission does not report to any designated Minister. Since the appellant is responsible for the TTPS and not a government Minister he is the appropriate party to whom a request for information is addressed and who can be properly sued.

*(ii). Unsupported findings*

[8]. Counsel submitted that the findings of the trial judge were just, fair and reasonable in all the circumstances of the case. He contended that the trial judge did not wrongly make assumptions about the operations and record-keeping capabilities of the TTPS. (a) It was submitted that the trial judge did not conclude that the TTPS was being untruthful. (b) Further, the trial judge was not wrong to conclude that the reporting requirements of the TTPS were sufficient to satisfy the respondent's requests. He argued that the TTPS is possessed with the necessary resources to manage a request made under the FOIA, in particular the respondent's requests, and to provide the information at the lowest possible costs. He added that this should not be an issue since the appellant has available to him a number of well-organised departments with allocations of staff being paid by the public purse to perform the required task.

*(iii). Failure to consider relevant material*

[9]. Counsel submitted the following:

- (a) As a result of the appellant's failure to provide reasonable directions as to how the respondent could restructure her queries and/or requests she was left with very little to act on.
- (b) The trial judge adequately dealt with the issue of safety and security of those involved in covert operations in that certain personal information may be redacted.
- (c) A reason for the non-disclosure of attorneys' information was never advanced, but that the option to redact their personal information is always available.
- (d) Time is of the essence with requests made under the FOIA and the trial judge deliberately sought to ensure that the requests were dealt with in a timely and efficient manner.

## **LAW, REASONING AND ANALYSIS**

### GOOD PROSPECTS OF SUCCESS

#### **Principles governing the application of a stay of execution**

[10]. It is trite that an appeal does not operate as a stay of the judgment or order appealed. The basic rule is that a successful party is entitled to enjoy the fruits of his success. In **National Stadium (Grenada) Limited v NH International (Caribbean) Limited And Others**<sup>5</sup>, Weekes J.A. (as she then was) set out the test to be applied when deciding whether to grant a stay of execution, pending an appeal. The test is whether the appeal has good prospects of success and whether there are any special circumstances which would justify the stay. Whether the

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<sup>5</sup> Civ App No 48 of 2011

court grants a stay depends upon all the circumstances of the case, but the essential factor is the risk of injustice.

(i). *Jurisdictional Error*

[11]. The first issue is whether the Minister of National Security is the proper party to the proceedings rather than the appellant. This issue was not raised before the trial judge.

[12]. **Section 4 (k) of FOIA** defines a public authority as follows:

“...  
(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”.**  
[emphasis added]

[13]. In **Parochial Church Council of the Parish of Ashton Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and Anor**<sup>6</sup> the court explained a public authority in the following way:

*“...The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution...  
...Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant*

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<sup>6</sup> [2003] UKHL 37 at para 7 - 11



*function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”*

[14]. The TTPS is a division of the Ministry of National Security. The appellant is at the head of the TTPS and is appointed by the Police Service Commission pursuant to **section 123 of the Constitution of the Republic of Trinidad and Tobago, Chp 1:01**. The TTPS performs a public service by maintaining law and order, preventing and detecting crime, apprehending offenders among other things. The TTPS is also publicly funded by the government and cannot successfully operate without such funding. It is not disputed that the appellant is a public authority under **sections 4 (k) (i) and (iii) of FOIA**.

[15]. **Section 13 (1) of FOIA** deals generally with requests made for access to official documents to a public authority whilst **section 13 (5)** deals specifically with access to an official document held by a public authority within **section 4 (k) (i) or (iii)**:

***“13. (1) A person who wishes to obtain access to an official document shall make a request in the form set out in the Schedule, to the relevant public authority for access to the document.***

*(2) A request shall identify the official document, or provide sufficient information to enable the designated officer of the public authority, or an employee of the public authority who is familiar with the relevant documents, to identify the document with reasonable effort.*

*(3) A request may specify in which of the forms described in section 18 the applicant wishes to be given access.*

*(4) Subject to section 21, a request under this section may be made for access to all records of a particular description or all records relating to a particular subject.*

***(5) An application for access to an official document held by a public authority referred to in section 4(k)(i) or (iii) shall be made to the responsible Minister”.*** [emphasis added]

[16]. In **The Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v The Honourable Minister of Finance (supra)** a request for access to certain

information was made to the Central Bank of Trinidad and Tobago, a public authority under **section 4 (k) (iii) of the FOIA**. The Central Bank denied the request. The applicant commenced judicial review proceedings against the responsible Minister, the Minister of Finance, who applied to strike out the judicial review proceedings on the ground that the applicant had failed to comply with **section 13 (5) of the FOIA** and that the Minister was not the proper party to the judicial review proceedings because he was not the decision-maker. The trial judge proceeded to dismiss the case on the basis that the request was made to the wrong party. On appeal, Mendonca J.A. held that the request for information in relation to a public authority falling under **section 4 (k) (i) or (iii)** ought to be made to the responsible Minister under **section 13 (5)**. In deciding whether the trial judge was correct to dismiss the application for the non-compliance with **section 13 (5) of the FOIA**, he considered that the appropriate approach was to focus on the consequences of the non-compliance of **section 13 (5)** and that any dismissal would depend on the circumstances of each case including among other things, whether the public authority assisted the applicant in making the proper request, prejudice to the Minister and his position in relation to the request. Mendonca J.A. concluded that a failure to comply with **section 13 (5)** was not a fatal defect which automatically warranted a dismissal of proceedings and that there were factors which demonstrated that this could not have been the intention of parliament. Parliament could not have intended that judicial review proceedings, which was an avenue to enforcing the right to access of information under the FOIA, could be defeated simply because the request was not sent to the responsible Minister. Further parliament could not have intended that a failure of a public authority to take reasonable steps to assist the applicant in making his request under **section 13** would defeat judicial review proceedings. Additionally, parliament could not have intended that where the court ordered access to information and no objection was taken during the judicial review proceedings as to the person to whom the request was made and the request was challenged on

other substantive grounds, that a failure to comply with **section 13 (5)** could be of significance at the appeal.

[17]. In this case, the respondent's requests for information were made to the appellant as the head of the TTPS. These requests ought to have been properly addressed to the responsible Minister, that is the Minister of National Security pursuant to **section 13 (5) of the FOIA** since the information requested fell within **section 4 (k) (i) and (iii) of the FOIA**. However, this failure to direct the requests to the Minister is not fatal since parliament's intention could not have been that the avenue for enforcing the right to access of information be defeated because the requests were not sent to the responsible Minister. Such failure is also not fatal for the following reasons:

- (i). **Section 22 (1) of the FOIA** provides that a decision in respect of a request made to a public authority may be made on behalf of that public authority by the responsible Minister or by a number of designated persons in accordance with arrangements approved by the said Minister. The appellant's office qualifies as a person so designated.
  
- (ii). Under **section 7 (1) of the FOIA**, a public authority shall with the approval of the responsible Minister publish in the Gazette and in a daily newspaper after the commencement of the FOIA a statement setting out amongst other things "...*(vi) a statement specifying the officer responsible within each public authority for the initial receipt of, and action upon, notices under section 10, requests for access to documents under section 13 and applications under section 36*".... In compliance with the provisions of **section 7 (1)** the TTPS published a document entitled "*Public Statement of the Trinidad and Tobago Service in compliance with section 7, 8 and 9 of the Freedom Of Information Act (FOIA) 1999*" in which it detailed as follows:

*“The Officers, listed below, are responsible for:*

- 1. ....*
- 2. Request for document under Section 13.*
- 3. ....*

*The decision maker is:*

*The Commissioner of Police*

*...*

*Designated Officers:*

*Assistant Commissioner Crime*

*...”*

It is clear that the appellant’s office has been designated as the decision-maker for providing or denying information under the **FOIA**. This public statement was issued by the office of the Commissioner of Police and the office has historically attempted to publicly comply with these obligations. It is important to note that the Act directs the obligations of the decision-maker to any person holding the office of Commissioner of Police. Therefore when the appellant attended to the respondent’s requests in respect of some of the information sought he was acting as the decision-maker. The appellant therefore cannot now seek refuge under the cover of **section 13 (5)** in order to avoid his responsibility as the designated decision-maker in respect of providing or denying the requests for information.

- (iii). The fact that the responsible Minister was not made a party to these proceedings under **section 13 (5)** is now being raised subsequent to the completion of the matter. During the proceedings in the court below, no objection was taken that the requests were wrongly addressed to the appellant, rather the requests were challenged on other substantive grounds. Therefore, a failure to comply with **section 13 (5)** is of no significance at this time. Consequently, the question of substituting the

Minister of National Security as a party to these proceedings does not arise.

Before departing, in respect of the respondent's submissions at paragraph 7 (a) above, it is important to note that this ground does not deal with a new reason being advanced for denying the respondent's requests as was the case in **The Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry, Civ App No. P 200 of 2014** but rather a procedural argument meant to defeat the respondent's application ab initio.

- (iv). **Section 14 (1) (a)** provides that a public authority shall take reasonable steps to assist a person wishing to make a request under section 13 in a manner which complies with that section. In this case, although the respondent was invited pursuant to section 21 (6) of the FOIA to streamline her requests in order to make it more accessible, no guidance was given to her regarding the requirement to address the requests to the responsible Minister. While the appellant falls short of complying with this statutory duty, such failure is not detrimental to the respondent so as to deprive her of her statutory right to access information.
  
- (v). The objective of the FOIA as stated under **section 3** is to extend the right of the public to access information in possession of public authorities. The failure to correctly direct the requests to the responsible Minister under **section 13 (5)** is a technical error and by itself cannot defeat this right.

Accordingly, this ground of appeal has no good prospect of success.

*(ii). Unsupported findings*

[18]. The trial judge is entitled to draw reasonable conclusions based on the evidence before him. An appellate court would be slow to interfere with the findings on the evidence of a trial judge unless he has gone plainly wrong. In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**<sup>7</sup> Lord Hodge at paragraph 12 stated that:

*“It has often been said that the appeal court must be satisfied that the judge at first instance has gone ‘plainly wrong’... This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts... Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge’s evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence...”*

[19]. In this case, the trial judge having assessed the evidence of the parties clearly rejected the explanations given by the appellant for denying certain of the respondent’s requests. In respect of the allegation that the trial judge concluded that the appellant was being untruthful when he said that former officers were hired for covert intelligence operations, it was open to the trial judge to infer and reasonably conclude that not all former police officers returned to the service to carry out covert intelligence operations since the relevant legislation provided for Special Reserved Police Officers with various skill sets to be appointed<sup>8</sup>. It was also open to him to infer that for the purposes of reporting to the relevant Ministry on its expenditure, that the appellant should have available the names of the contractors retained for the period August 2018 to October 2019, the date of each retainer and cost of the services since there ought to have been a department

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<sup>7</sup> [2014] 4 All ER 418

<sup>8</sup> Judgment dated September 2, 2020 at para 7.

within the TTPS that dealt with contracts and procurement. The public statement issued by the office of the Commissioner of Police in compliance with Section 7, 8 and 9 of the FOIA presented the TTPS as a highly organised structure with various units and sections which dealt with areas such as Finance, Human Resource and Planning Research amongst others. Therefore, the trial judge's conclusion that the reporting requirements of the TTPS were sufficient to meet the respondent's request was not unreasonable. Accordingly, this ground of appeal has no good prospect of success.

(iii). *Failure to consider relevant material*

[20]. It is noted that the trial judge dealt adequately with the concerns of safety and security in relation to the covert intelligence operations by suggesting that personal information can be redacted. The trial judge also cannot be faulted for finding that no legal professional privilege could attach to providing the names and cost of attorneys engaged since they were funded from the public purse. Whilst the trial judge did not specifically deal with the safety and security of attorneys, their personal information may also be redacted. With respect to the nine-day time frame ordered by the trial judge for the disclosure of personal information, the trial judge stated at the outset of his decision that "*public authorities must see the giving of information to be an important exercise deserving of priority. The Act makes that plain by providing the short timelines it has*". The time frame set by the trial judge is not unreasonable since the departmental structure of the TTPS was held out to be organised and efficient by the public statement issued by the office of the Commissioner of Police. Therefore, this ground of appeal has no good prospect of success.

[21]. In the circumstances, the appellant has fallen short in demonstrating that his appeal has a good prospect of success. Accordingly, I now go on to consider the risk of injustice and special circumstances.

## B. RISK OF INJUSTICE

### SUBMISSIONS

- [22]. Counsel for the appellant submitted that if a stay is not granted it would be prejudicial to the appellant by rendering the appeal nugatory. It was contended that third parties' personal/financial information will be disclosed without a fair opportunity to challenge same with the exposure to increased security risks. Also, covert intelligence operations may be compromised. It was further contended that all of these factors added together with the fact that the appellant has been wrongly subjected to the powers of the court and the redeployment of the scarce police resources to collate some of the information ordered were special circumstances justifying the grant of a stay of execution pending the appeal.
- [23]. In reply, counsel for the respondent submitted that the appellant had not presented any clear evidence of any risk of injustice. He argued that any concerns of safety and security breaches and compromising covert operations are curable by redaction of the information in question. Counsel contended that the respondent is entitled to the fruits of her success and that her right to access information in a timely manner would be severely prejudiced if a stay is granted.

### LAW, ANALYSIS AND REASONING

- [24]. In **Leicester Circuits Limited v Coates Brothers PLC**<sup>9</sup>, Potter LJ stated that in determining whether or not to grant a stay the following approach ought to be considered:

***“The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay,***

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<sup>9</sup> [2002] EWCA Civ 474



***but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal.”***<sup>10</sup>[emphasis added]

[25]. If a stay is refused the appeal would be rendered nugatory since the requested information would be released into the public domain. The act of redacting certain information before it is released to the respondent is a practicable option which avoids any concerns of safety and security of third parties, or the compromise of covert intelligence operations. It is the duty of the TTPS to collate, compile and deliver requested information under the FOIA. It is, therefore, no excuse nor is it of any concern to the court that its resources would be strained in fulfilling its statutory obligations. The FOIA has been in force since 2000, over twenty years now and it is expected that all arrangements would be in place for the TTPS as a public authority to meet its statutory obligations. Therefore, the records ought to be regularly updated and readily available. Moreover, such information can now be provided electronically which significantly, if not completely eliminates the need for hard copies and the associated costs. On the other hand, if a stay is granted I am mindful that the respondent is entitled to the fruits of her success, and to her right to access information in a timely manner which allows her to fulfil her responsibility as an investigative journalist to keep the public informed about matters of public interest in a timely fashion. In striking the balance, it seems to me that since the appeal has no good prospects of success and since the respondent is entitled to the information the balance comes down in favour of not granting the stay.

**ORDER**

[26]. In the circumstances, the stay is hereby refused. The appellant to pay costs.

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A. Yorke-Soo Hon, J.A.

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<sup>10</sup> paragraph 13