

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2021-03954

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES, 1998 AND PURSUANT TO SECTION 6(1) OF THE JUDICIAL REVIEW ACT, CHAPTER 7:08

BETWEEN

NICHOLAS RAMPERSAD

*Applicant/Intended Claimant*

AND

THE CABINET OF TRINIDAD AND TOBAGO

*1st Respondent/Intended Defendant*

THE MINISTER OF RURAL DEVELOPMENT AND LOCAL GOVERNMENT

*2nd Respondent/Intended Defendant*

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

Applicant/Intended Claimant: Mr. Ramlogan (SC), Ms. Lutchmedial instructed by Ms. Madhosingh and Mr. Siewasaran

1<sup>st</sup> Respondent/Intended Defendant: Mr. Hosein (SC), Ms. Rahaman instructed by Ms. Joseph

2<sup>nd</sup> Respondent/Intended Defendant: Mr. Hosein (SC), Ms. Rahaman instructed by Ms. Joseph

Date of Delivery: July 19, 2023

## JUDICIAL REVIEW

[1] This is a rolled-up hearing of an Application for Leave for Judicial Review. The main issue is whether there was delay or unreasonable delay by the Respondents in advising the Office of the President to issue a Writ of Elections for the bye-elections for the electoral district of Debe South in the Penal/Debe Regional Corporation (“the PDRC”). Since the filing of this claim, the election has been called. The Applicant modified his claim for Relief to take this fact into account.

[2] The Applicant sought the following Reliefs:

a. An order that time be and is hereby enlarged for making this claim for Judicial Review;

b. An order that Leave be and is hereby granted to apply for Judicial Review; and

c. Orders for the following Declaratory Relief:

i. A Declaration that the failure and/or refusal of the Cabinet and/or the Minister of Rural Development and Local Government (“the Minister”) acting under the general authority of the Cabinet to inform the Office of the President that the seat of the Councillor for Debe South in the PDRC had become vacant since February 22, 2021 or within a reasonable time thereafter was illegal, unlawful, and unreasonable;

ii. A Declaration that the failure and/or refusal of the Cabinet and/or the Minister acting under the general authority of the Cabinet to advise the President to exercise the power to issue a Writ addressed to the Returning Officer of the electoral district of Debe South in the PDRC for the election of a new Councillor since February 22, 2021 or within a reasonable time thereafter was illegal, unlawful, and unreasonable;

d. The Applicant no longer pursues the Orders for Mandamus.

[3] The bye-elections were held on February 7, 2022, before all submissions were filed.

## The Grounds

[4] The following Grounds were relied upon by the Applicant:

- a. That the delay in calling the election amounted to a fundamental subvention of the Rule of Law enshrined in the **Preamble of the Constitution** that those exercising public power must do so lawfully by acting in accordance with the **Constitution** and any other relevant law. The Applicant contended that such delay amounted to a breach of **Section 1** of the **Constitution**<sup>1</sup> and more importantly a critical concept of democracy, that the people must decide who should govern them.
- b. The delay was in breach of **Section 29** of the **Municipal Corporations Act (MCA)**<sup>2</sup> and **Section 80** of the **Constitution**<sup>3</sup>.

[5] The conjoint effect of **Section 29** of the **MCA** and **Section 80(1)** of the **Constitution** is that the Cabinet and/or the Minister acting under the general authority of Cabinet had a duty to inform the Office of the President that the seat of the Councillor for Debe South in the PDRC had become

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<sup>1</sup> By **Section 1** of the **Constitution** it is declared expressly that 'The Republic of Trinidad and Tobago shall be a sovereign democratic State'.

<sup>2</sup> **29.** On being satisfied that the seat of a Councillor has become vacant, the President shall issue a writ addressed to the Returning Officer of the appropriate electoral district for the election (hereinafter referred to as a "bye-election") of a new Councillor.

<sup>3</sup> **80. (1)** in the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law, and, without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is require to act –

- (a) in his discretion;
- (b) after consultation with any person or authority other than the Cabinet; or
- (c) in accordance with the advice of any person or authority other than the Cabinet.

**(2)** Where by this Constitution the President is required to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any case so acted shall not be enquired into any Court.

**(3)** Without prejudice to any other case in which the President is authorized or required to act in his discretion, the President shall act in accordance with his own deliberate judgement in the performance of the following functions:

- (a) in the exercise of the power to appoint the Prime Minister conferred upon him by **Section 76(1)** or **(4)**;
- (b) in the exercise of the powers conferred upon him by **Section 78** (which relates to the performance of the functions of the Prime Minister during absence, illness or suspension) in the circumstances described in the proviso to **subsection (2)** of that Section;
- (c) in the exercise of the power to appoint the Leader of the Opposition and to revoke any such appointment conferred upon him by **Section 83**.

vacant immediately upon the vacancy having occurred or within a reasonable time thereafter. Further, that the Cabinet and/or the Minister acting under the general authority of the Parliament had a duty and the power to advise the President to exercise the power to issue the Writ addressed to the Returning Officer of the electoral district of Debe South for the election of a new Councillor.

[6] The failure of the Cabinet and/or the Minister acting under the authority of Cabinet to notify and advise the President of the vacancy in the electoral district of Debe South in the PDRC for approximately nine (9) months as well as failure to advise the President to exercise the power to issue the Writ addressed to the Returning Officer of the electoral district of Debe South for the election of a new Councillor is justiciable under **Section 15** of the **Judicial Review Act (JRA)**<sup>4</sup> as the said failure is inordinate, unreasonable, unlawful and illegal. The fact that no timeframe is proscribed for the Respondents' compliance with the statutory duty under **Section 29** of the **MCA** is no excuse since in such a circumstance the law requires a duty so imposed it must be carried out without unreasonable delay<sup>5</sup>.

[7] Pursuant to **Section 7** of the **JRA**, the aforesaid failure and delay gives rise to matters of public interest which require the Court's intervention as:

- i. It is important that unlawful administrative decisions that impact directly upon the lives of citizens do not go uncorrected. The absence of an elected Councillor is important to every citizen of this country and in this instance, more particularly the constituents of the electoral district of Debe South in the PDRC which had been without representation for nine (9) months.
- ii. The proper interpretation of the powers that are given by the **MCA** is a matter of great and general public importance to the democracy of Trinidad and Tobago.

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<sup>4</sup> **15.(1)** Where –

- (a) a person has a duty to make a decision to which this Act applies;
- (b) there is no law that prescribes a period within which the person is required to make that decision; and
- (c) the person has failed to make that decision,

a person who is adversely affected by such failure may file an application for judicial review in respect of that failure on the ground that there has been **unreasonable delay** in making that decision.

<sup>5</sup> **Section 23** of the **Interpretation Act, Chapter 3:01**. See paragraph 21 of the Notice of Application.

- iii. The supervisory jurisdiction and constitutional jurisdiction of the High Court that exists by way of Judicial Review is not rights based but more targeted at public wrongs and the misuse of public power, or the unlawful exercise of public power in a capricious, arbitrary and unlawful manner. In those circumstances the Applicant is most well suited to make this challenge.

[8] The decision of the Respondents was challenged on the following grounds pursuant to **Section 5(3)** of the **JRA**:

- i. The continuing inaction is illegal, unauthorised and contrary to law;
- ii. It amounts to a failure to satisfy or observe the conditions and procedures required by law;
- iii. The failure to act amounts to the exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised that power;
- iv. The inaction amounts to an abuse of power;
- v. It is in conflict with the policy of the **MCA**, the **JRA** and the **Interpretation Act**;
- vi. It amounts to the breach of or omission to perform a duty.

[9] The Chronology of Events/Facts on which the claim is based are:

- i. On December 2, 2019, Mr. Purushottam Singh was elected the Local Government Councillor for the electoral district of Debe South in the PDRC.
- ii. On February 14, 2021, Councillor Singh passed away.
- iii. On February 22, 2021, the Chairman of the PDRC declared the seat of the electoral district of Debe South vacant.

- iv. On April 6, 2021 the Minister notified the Cabinet of the vacancy created by the death of Mr. Singh.
- v. By Cabinet Minute No. 722 dated April 22, 2021, Cabinet noted that the PDRC, at its Statutory Meeting on February 22, 2021, declared the office of Councillor for the electoral district of Debe South in the PDRC vacant, consequent on the death of Councillor Purushottam Singh on February 14, 2021 and that in accordance with the provisions of the **MCA**, a bye-election for the said district was due.
- vi. By Memorandum dated May 27, 2021, the Minister informed the CEO, inter alia, that the matter was referred to Cabinet and that she would in due course be informed of the bye-election's date (See Appendix 4)."

[10] On January 3, 2022, the Prime Minister advised the President that the bye-elections for Debe South will be held on February 7, 2022, and requested that the Writ of Elections be issued by the President in accordance with **Section 29** of the **MCA**.

[11] The bye-elections were held on February 7, 2022, in which the United Congress (UNC) Party retained the seat with the victory of Mr. Khemraj Sunil Seecharan.

## **EVIDENCE FOR THE INTENDED CLAIMANT**

### ***Mohanie Ramnarine***

[12] Ms. Ramnarine testified that she was a Councillor in the PDRC where she served together with Purushottam Singh from 2019 until his death on February 14, 2021. The Chief Executive Officer (CEO) of the PDRC informed the Ministry of Rural Development and Local Government of his death by letter dated February 15, 2021, and advised therein that the Corporation would declare his seat vacant at a later date<sup>6</sup>.

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<sup>6</sup> Paragraph 8 of the Affidavit of MR filed on November 15, 2021

[13] Ms. Ramnarine testified that on February 22, 2021, the Council declared Mr. Singh's seat vacant. This declaration was sent to the Ministry of Rural Development and Local Government and by Memorandum dated May 27, 2021, the Ministry indicated that the information had been passed to Cabinet and that in due course the CEO of the PDRC would be advised of the date for bye-election. This witness asserted that she could not respond to all the demands of her burgesses since Mr. Purushottam's vacant seat had not been filled.

***Nicholas Rampersad***

[14] The Applicant, an elector in the electoral district of Debe South testified that since Mr. Singh's passing his requests to the Corporation for assistance in cleaning drains and ravines have been unsuccessful because his Representative who had died had not been replaced. He indicated that some nine (9) months had passed since his Councillor's death without the announcement of a date for election for the vacant seat.

[15] Mr. Rampersad testified further, that apart from a letter from the Minister acknowledging receipt of his pre action protocol letter dated October 14, 2021, no response was forthcoming from the Attorney General (AG) who had also been sent a copy of his pre action letter.

[16] The Applicant testified that bye-elections were held in a timely manner in other districts where seats had been declared vacant in August to September 2020 and elections held by January 2021 (within six (6) months). In the circumstances, he formed the view that the delay in fixing a date for election was unreasonable.

[17] In a Supplemental Affidavit, the Applicant disputed the Respondent's claim that the COVID-19 epidemic and the **Regulations** issued thereunder delayed fixing a date for election, citing the fact that a General Election had been held in August 2020; further, that the THA polls as well as bye-elections in five electoral districts were similarly held during the Pandemic in January 2021. The outcome of the THA elections was a tie since both parties obtained the same number of seats. In order to address the issue, the **THA Act** was amended, and passed in both houses on February 19, 2021, and March 2, 2021, respectively, assented to by the President on March 16, 2021, and proclaimed on July 26, 2021. A new date for THA elections was thereafter fixed December 6, 2021.

***Allen Sammy***

[18] In response to the Respondent's assertion that the residents of the PDRC were not underserved following the death of their Councillor Mr. Singh, Mr. Sammy, Chairman of the PDRC stated there was tremendous delay in attending to residents' requests consequent upon Mr. Singh's death. He also pointed out that their needs could not be met by the Member of Parliament (MP) who depends upon the Municipality to deal with issues that affect their districts within the constituency which covers a much wider area.

**EVIDENCE FOR THE DEFENDANT**

***Dr. Roshan Parasram (Chief Medical Officer)***

[19] Dr. Parasram testified that as Chief Medical Officer (CMO) he is the designated Quarantine Authority under the **Quarantine Act**; his functions include advising relevant personnel of the Ministry of the best practice policies in the area of public health, including the Minister of Health. Dr. Parasram deposed the following:

- a) That the first COVID-19 case was recorded in the country on March 12, 2020, and the first related death was recorded on March 25, 2020. Local spread of the virus also began in March 2020. The first wave of the Pandemic spanned the period of March 2020 to April 2020. This wave was characterised as being sporadic in nature.
- b) This was followed by a second wave which commenced in July 2020. This wave was characterised as having community transmission.
- c) The country received its first donation of vaccines on February 15, 2021, which was used to vaccinate frontline workers in March 2021. Since then, further donations of vaccines were received and as of December 22, 2021, six hundred and sixty-two thousand, eight hundred and seventy (662,870) persons have been fully vaccinated. This represents about just over forty-seven percent (47%) of the population and as such the national population has not reached population immunity for which experts estimate may require at least eighty to ninety percent (80-90%) of a population to have achieved immunity through vaccination or prior illness with the COVID-19 virus. Studies have shown that people who are not vaccinated are most at risk.

- d) The third wave commenced in mid-March 2021 where a week-on-week increase in cases of eighty-nine percent (89%) was identified. March 2021 eventually amassed approximately two hundred and ten percent (210%) of the total cases for February 2021 and cases continued to rise into April 2021. Dozens of cases were seen in early April 2021 with an average of forty-five (45) per day. By April 20, 2021, the daily new case count crossed one hundred (100) for the first time in 2021. The infection rate peaked in May when the daily new cases continued to increase up to a maximum of seven hundred and eight (708) new cases on May 2, 2021.
- e) New cases started to decline in June 2021 and plateaued during July to September. However, in October 2021 a rising daily trend was observed with a thirteen percent (13%) increase. In November, the increase was two hundred and ten percent (210%) with a daily maximum of seven hundred and eighty-one (781) on November 17, 2021. November 2021 was the worst month of the Pandemic to date with a daily average of four hundred and eighty-six (486) new cases and sixteen (16) deaths. As of December 22, 2021, there have been eighty-seven thousand, fifty-two (87,052) positive cases of COVID-19 which have resulted in two thousand, six hundred and sixty-two (2,662) confirmed deaths. The country then experienced the highest levels of infection and death since the onset of the Pandemic.
- f) With this spike in active cases, there was once more an increase in hospitalisation. Hospital occupancy was below forty percent (40%) prior to mid-July 2021 but it rose to over seventy percent (70%) in less than three (3) weeks. The high percentage occupancy rate put all medical staff under heavy strain. This added strain had the potential to overwhelm these resources to the extent that persons with other medical conditions or emergencies could be deprived of life-saving care or treatment.
- g) On January 31, 2020, by **Legal Notice No. 34 of 2020**, Her Excellency President Paula-Mae Weekes declared that the 2019 Novel Coronavirus (COVID-19) was "a dangerous infectious disease".

- h) In response to the COVID-19 Pandemic, many countries, including Trinidad and Tobago had to introduce extraordinary measures by legislation, both primary and delegated to restrict the liberty of its citizens. The Government introduced the first **Public Health (2019 Novel Coronavirus [2019-nCoV]) Regulations** under **Section 105** of the **Public Health Ordinance** on March 19, 2020, to implement a series of restrictions on the population of Trinidad and Tobago.
- i) The Government of Trinidad and Tobago, during the months since the Pandemic was declared, took drastic measures to prevent the importation and local spread of the virus inclusive of:
- i. Closure of national borders except for commercial trade from March 22, 2020, until July 17, 2021;
  - ii. Limits on public gatherings, except for religious gatherings;
  - iii. Imposing **Quarantine Orders** pursuant to the **Public Health Ordinance**;
  - iv. Closure of schools, except for the conduct of specified examinations;
  - v. Closure of beaches, rivers and other inland water bodies and public pools;
  - vi. Closure of and/or restrictions on recreational spaces;
  - vii. Restricted hours of operation for businesses;
  - viii. Reduced public transport capacity;
  - ix. Prohibition of and/or restrictions on in-house dining and bar services;
  - x. Prohibition of public parties, including on boats;

- xi. Prohibition of group contact and team sports;
  - xii. Implementing a nationwide public vaccination campaign; and
  - xiii. Embarking on a public awareness campaign to practice social distancing.
- j) During the third wave in the country on May 15, 2021, by **Legal Notice No. 141 of 2021**, The President of the Republic of Trinidad and Tobago, by Proclamation stated that she was satisfied that a public emergency had arisen as a result of the outbreak of an infectious disease [2019 Novel Coronavirus (2019-nCov)] and that a state of public emergency existed in the Republic of Trinidad and Tobago. By **Legal Notice No. 142** dated May 16, 2021, **The Emergency Powers Regulations 2021** was passed by which several restrictions on freedom of movement were imposed, including a curfew from nine in the evening to five in the morning (9 p.m. – 5 a.m.). The Trinidad and Tobago Police Service (TTPS) and the Trinidad and Tobago Defence Force (TTDF) were also endowed with emergency powers.
- k) The purpose of this curfew was to limit the movement of citizens and to encourage citizens to stay at home as much as possible with the aim of containing and reducing the spread of the virus. The national nightly curfew from nine in the evening to five in the morning (9 p.m. – 5 a.m.) was implemented during a period described as “an indefinite State of Emergency” with residents being unable to leave their homes except to attend to essential issues. The State of Emergency and curfew ended with effect from November 17, 2021.
- l) In the public service there was a ‘work from home’ policy implemented with staff being placed on rotation to curb the number of persons in public buildings at any one time. This measure, whilst allowing for some continuance of work, inevitably resulted in a reduction in the productivity of the government service, which led to many processes and projects being delayed or suspended.

- m) Mass gatherings and the movement of persons especially with the non-adherence to the public health guidelines (e.g., masking) increase the rate and likelihood of the spread of the COVID-19 virus from person to person.
  
- n) The above measures were taken to protect citizens from unnecessary exposure to the COVID-19 virus and thereby limit the morbidity and mortality of the disease.

***Desdra Bascombe***

- [20] This witness, a Permanent Secretary in the Ministry of Rural Development and Local Government testified about the chronology of events after the Ministry was informed of the death of Councillor Singh on February 14, 2021, as outlined above.
  
- [21] By Memorandum dated February 15, 2021, the CEO of the PDRC informed the Ministry of the passing of Councillor, Mr. Purushottam Singh, on February 14, 2021, and of the effect of **Section 27(1)(e)** of the **MCA** which was to render the office vacant. As a consequence, the CEO advised that in accordance with **Section 27(2)** of the **MCA**, the Council shall forthwith declare the office vacant.
  
- [22] During the period 2000 to 2021, there were a total of five (5) Local Government Elections held in the years of 2019, 2016, 2013, 2010 and 2003 and eleven (11) Local Government bye-elections. The term of Local Government Bodies was extended between 2000 and 2010 by virtue of several amendments to the **MCA**, 1990 by **Acts No. 14 of 2006, No. 18 of 2007, No. 11 of 2008 and No. 5 of 2009**.
  
- [23] In comparison to the instant case, the time frames to fill vacancies in the office of Councillor due to the death of the Councillor and filled in a bye-election as follows:
  - i. Three (3) months for the Rio Claro North electoral district between January 3, 2000, and April 3, 2000;
  
  - ii. Six (6) months and twenty-seven (27) days for the Siparia East/San Francique South electoral district between December 21, 2004, and July 18, 2005;

- iii. Seven (7) months and seventeen (17) days for the Belmont East electoral district between November 29, 2017, and July 16, 2018; and
- iv. Eleven (11) months and twenty (20) days for the Barataria electoral district between July 26, 2017, and July 16, 2018.

#### **LEAVE - Discussion**

[24] It is well established that the Leave hurdle is relatively low. In **Sookhan v The Children’s Authority**<sup>7</sup> the Privy Council stated:

*2. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review that has a realistic prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy: see governing principle (4) identified in Sharma v Browne-Antoine [2006] UKPC 57; [2007] 1 WLR 780, para 14.*

[25] This being a rolled-up hearing, the issue of Leave as well as the substantive claim must be considered together. Also of relevance, on the facts of this case, is the fact that the bye-elections having been held before the conclusion of this case, whether there is any *lis* before the court, and therefore any reason, in the public interest, for the claim to be heard.

[26] In **Joanne Bailey-Clarke v The Ombudsman etc.**<sup>8</sup> Kokaram J (as he then was) stated the following in relation to the granting of Leave in a rolled-up hearing:

*“The fuller the argument and consideration of the evidence, the easier it is for the Court to form a judgment on the prospects of success. In such a case the Court engages in as Fordham describes as “enhanced arguability” and a “realistic prospect of success” may well be for practical purposes as stringent as requiring a substantial prospect of success or likely to succeed. See R (on the application of Federation of*

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<sup>7</sup> [2021] UKPC 29

<sup>8</sup> CV2016-01809 paragraph 26

*Technological Industries) and others v. Commissioner of Customs and Excise [2004] E.W.H.C. 254 (Admin) at [8].*

[27] I agree with the Applicant's submission that the Court must have regard to the public interest whenever an Application for Leave is made. If the Applicant does not have direct standing (in that he is not 'directly affected'), the court may nevertheless consider the grant of Leave in the public interest.

[28] **Sections 5(2)(b)** and **Section 7(1)** of the **JRA** provide as follows:

*5(2) The Court may, on an application for judicial review, grant relief in accordance with this Act – (b) to a person or group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case.*

*7(1) Notwithstanding section 6, where the Court is satisfied that an application for judicial review is justifiable in the public interest, it may, in accordance with this section, grant leave to apply for judicial review of a decision to an applicant whether or not he has a sufficient interest in matter to which the decision relates.*

[29] Accordingly I hold that the Applicant has satisfied the requirement of public interest standing pursuant to **Section 5(2)** of the **JRA** since he is a constituent of the electoral district of Debe South who was affected by the absence of a Councillor for nine (9) months upon the death of the incumbent which is the subject matter of this claim. I also hold that this application for Judicial Review is justifiable in the public interest since it concerns an important issue - whether in all the circumstances there was unreasonable delay by the Respondents in advising the Office of the President to issue a Writ of Elections for the bye-elections for the electoral district of Debe South in the PDRC.

[30] The test for the grant of Leave was clearly outlined in the case of **Satnarine Sharma -v- Browne-Antoine & Ors**<sup>9</sup>:

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<sup>9</sup> [2006] UKPC 57 at paragraph 14(4) per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe

*“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. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:*

*“... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”*

*It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen”: Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733.”*

[31] Having regard to the fact that this is a public interest claim involving an important issue of whether the Respondents acted in breach of the **MCA** and the **Constitution** by failing to advise the President to issue a Writ of Elections for the bye-elections for the electoral district of Debe South within a reasonable time, I hold that the Applicant has established an arguable ground for Judicial Review with a reasonable prospect of success that there was unreasonable delay by the Respondents in so advising the President.

## Unreasonable Delay

[32] The Applicant made the following submissions in support of his contention that there was unreasonable delay by the Respondents in advising the President to issue the Writ of Elections for the bye-elections for the electoral district of Debe South:

- a. That the holding of elections within a reasonable time after they are due is a cardinal feature and principle of a democratic country;
- b. The **Constitution** contains an implied right to vote which is a corollary of the constitutional concept of a democracy, the Rule of Law and the protected right to join political parties and to express political views under **Section 4(e)** of the **Constitution**<sup>10</sup> and the right to freedom of thought and expression under **Section 4(i)**<sup>11</sup>;
- c. This country ought to comply with international norms embodied in international treaties to which this country is a signatory;
- d. The Court ought to take into consideration the consequence of the delay which effectively robbed the Applicant and the people of this district of their right to vote and elect a Councillor of their choice and left them without representation.

The Court was urged that in considering this issue it ought to take into account the matters listed hereunder:

- i. The challenges posed by the Pandemic;
- ii. The fact that many other elections were held during the Pandemic in districts with larger electorates and in other neighbouring countries including Barbados without any major problems;

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<sup>10</sup> **4(e)** The right to join political parties and to express political views

<sup>11</sup> **4(i)** Freedom of thought and expression

- iii. The measures that can and have been taken to minimise the risk of exposure to the coronavirus e.g., virtual political meetings and rallies, numerical restrictions, masking and social distancing when queueing up to vote under the watchful eyes of the Police.

[33] The Respondents submitted in support of their argument that there was no delay, let alone unreasonable delay in advising the President to issue the Writ of the Elections for the bye-elections for the electoral district of Debe South the following arguments:

- a. That during the period 2000 to 2021, there have been a total of five (5) Local government Elections held in the years of 2019, 2016, 2013, 2010 and 2003 and eleven (11) Local Government bye-elections. The term of Local Government Bodies was extended between 2000 and 2010 by virtue of several amendments to the **MCA, 1990** by **Acts No. 14 of 2006, No. 18 of 2007, No. 11 of 2008** and **No. 5 of 2009**.
- b. Historically, whenever vacancies in the office of Councillor arose due to the death of the Councillor the time periods for filling those seats were as follows:
  - i. Three (3) months for the Rio Claro North electoral district between January 3, 2000, and April 3rd, 2000;
  - ii. Six (6) months and twenty-seven (27) days for the Siparia East/San Francique South electoral district between December 21, 2004, and July 18, 2005;
  - iii. Seven(7) months and seventeen (17) days for the Belmont East electoral district between November 29, 2017, and July 16, 2018; and
  - iv. Eleven (11) months and twenty (20) days for the Barataria electoral district between July 26, 2017, and July 16, 2018.
- c. Based on an analysis of the records above, it cannot be said that the vacancy of nine (9) months and continuing in the electoral district of Debe South was a deliberate attempt to

disenfranchise the constituents of Debe South or an unreasonable delay, especially in the prevailing circumstances of an ongoing and worsening public health emergency caused by the COVID – 19 virus.

- d. In addition, at the material time of the vacancy the country was under a State of Emergency with the imposition of a curfew. The purpose of this curfew was to limit the movement of citizens and to encourage citizens to stay at home as much as possible with the aim of containing and reducing the spread of the virus. Further regulations were issued related to the mandatory closure of, inter alia, restaurants, beaches, day-cares and pre-schools and places of worship, save and except for wedding and funeral services. The national nightly curfew from nine in the evening to five in the morning (9 p.m. – 5 a.m.) was implemented during a period described as “an indefinite State of Emergency” with residents being unable to leave their homes except to attend to essential issues. Public gatherings were banned, religious ceremonies were limited, except for funerals and weddings which were limited to ten (10) attendees only. In addition to the **Emergency Powers Regulations, Nos. (1) and (2)**, the Government, via its press conferences during the State of Emergency, repeatedly advised and encouraged citizens to stay at home as much as possible and to limit their movements to that which was only very essential and necessary.
- e. That the State of Emergency was proclaimed a mere twelve (12) days before the Minister informed the CEO of the PDRC that the matter was referred to Cabinet and that she would in due course be informed of the bye-election’s date.
- f. There was no breach of duty imposed by **Section 80(1)** of the **Constitution** or **Section 29** of the **MCA** or any other law.
- g. That the Cabinet and the Minister complied with the provisions of the **MCA** to notify of the vacancy and inform the Minister who in turn notified the Cabinet.

[34] The Respondents also contended that the evidence shows that the relevant provisions of the **MCA** were triggered and complied with by the PDRC, the Cabinet and the Minister. The seat was declared vacant, the Minister was notified of the vacancy and in turn the Minister notified the Cabinet. There

was no breach of statutory duty by the Minister as all relevant obligations under the **MCA** were satisfied by promptly notifying the Cabinet. The Minister's statutory duty does not include advising the President to issue a Writ of Elections or setting a date for elections. That is the responsibility of the Cabinet.

[35] The Respondents submitted that there is no prescribed time limit under the **MCA** for the Cabinet to advise the President to issue a Writ of Elections or to hold bye-elections after the death of a Councillor and thus, there was no breach of statutory duty on the part of Cabinet. The Respondents submitted further that there is also no prescribed time limit under **Section 29** of the **MCA** for the President to issue such a Writ after being so advised. Furthermore, the President has the discretion under **Section 34(1)** of the **Representation of the People Act**<sup>12</sup> to postpone elections even if a Writ of Elections was issued under **Section 29** of the **MCA**.

[36] The Respondents argued that **Section 23** of the **Interpretation Act**<sup>13</sup> provides guidance for situations where there is no prescribed time-limit for an action required by law whereby the act should be done without "*unreasonable delay, having regard to the circumstances and as often as due occasion arises*".

[37] In further arguments the Respondents asserted that **Section 27** of the **MCA** cannot be relied on to infer any time limit as it is simply not applicable to this instant matter. This Section provides for the declaration of a seat being declared vacant "forthwith" when a Councillor becomes disqualified from holding office. Death is not included as one of the grounds for disqualification of a Councillor as outlined in **Section 11(8)** of the **MCA**. In any event, the seat was declared vacant only eight (8) days after Mr. Singh died and which translates to only six (6) working days.

[38] The constituents of Debe South were at all material times represented at a local government level in the form of the Council of the Regional Corporation and at the national level through their Member of Parliament.

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<sup>12</sup> Chapter 2:01

<sup>13</sup> Chapter 3:01

[39] There being no provision in law which stipulates a mandatory timeframe within which a bye-election should be held upon the death of a Councillor, the issue therefore is reduced to one of reasonableness, taking into consideration the circumstances prevailing in the country. Having regard to the matters prevailing in the country during the relevant period of 2021, facts demonstrates that it was not in the public interest to fix a date for the bye-election.

[40] It is not disputed that the Cabinet has the responsibility to advise the President of the vacancy in an electoral district. In this instance, the Cabinet postponed advising the President as this action would trigger the issue of the Writ to hold the bye-elections which was considered not to be in the public interest given the status of the COVID-19 virus Pandemic in the country.

### Discussion

[41] **The Preamble to the Constitution of Trinidad and Tobago** provides<sup>14</sup>:

*“Whereas the people of Trinidad and Tobago have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority;”*

[42] In **Ravi Balgobin Maharaj v The Cabinet of Trinidad and Tobago and Another**<sup>15</sup> the Privy Council acknowledged that the **Constitution** contains “no expressed reference to democratic participation in local government and no detailed provisions as regards local government similar to those concerning elections for Members of the House of Representatives”. However, the Board was not prepared to accept wholeheartedly the Court of Appeal’s conclusion that there was no Constitutional Right to participate in elections for local government. In **Ravi Balgobin Maharaj** supra the Court opined<sup>16</sup>:

*“The essential characteristic of a representative democracy, whether at a national or local level, is that the representatives are chosen by popular vote. In a modern democracy, such as*

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<sup>14</sup> Chapter 1:01 part (c)

<sup>15</sup> [2023] UKPC 17

<sup>16</sup> Paragraph 31 in **Ravi Balgobin Maharaj**

*Trinidad and Tobago, all individuals have the right to participate in the popular vote, subject only to specified conditions and disqualifications. In the case of municipal corporations, the popular vote is direct for the Councillors and indirect, by means of party lists, for Aldermen. It is also an essential element of any democratic form of government, whether at a national or a local level, that the electorate choose their representatives for a limited period.”*

[43] The Board described the rights conferred by the democratic system of government such as that enjoyed by the people of Trinidad and Tobago, thus<sup>17</sup>:

*“The rights conferred by a democratic system of government are not only individual rights enjoyed by each person entitled to vote. It is also the right of all members of the relevant community to be governed by representatives chosen democratically, whether or not individually they are entitled to vote or have exercised that right.”*

*“A democratic society will necessarily engage other rights – freedom of expression and association, for example – but the election of representatives for a fixed or maximum period is the foundation on which it is built.”*

[44] The Court also held that ‘the fact that the democratic process, and the voting rights of individuals in that process, are derived solely from statute does not diminish their fundamental importance’. The Court also stated that ambiguities ‘in legislation are resolved in favour of democratic rights’.<sup>18</sup>

[45] As noted in **Ravi Balgobin Maharaj supra**<sup>19</sup> while there is no express Constitutional Right to vote in Local Government Elections; this fact does not diminish the fundamental importance of citizens’ right to vote in these elections.

[46] From the facts of this case I am of the view that there was no delay by the Second Respondent in advising the Cabinet that a vacancy had arisen in the electoral district of Debe South as a result of the death of Councillor Mr. Singh. As the facts demonstrate,<sup>20</sup> the Minister was informed by the

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<sup>17</sup> Paragraph 32 and 33 per Lord Richards in **Ravi Balgobin Maharaj**

<sup>18</sup> Paragraph 42

<sup>19</sup> Paragraphs 14 and 15

<sup>20</sup> Paragraph 9 supra

CEO of the PDRC that the office of Councillor had been declared vacant on March 5, 2021 and a Notice to that effect on the same date was posted. On April 6, 2021, a mere month after receiving such Notice the Minister advised Cabinet of this fact as he was required to do. In my view, the Minister thereby discharged his responsibility under the **Act** to notify Cabinet.

[47] The central issue that I must determine is whether the decision of the Cabinet to postpone advising the president to issue the writ of elections was unreasonable. Relevant to the determination of this issue is whether the reason given for the delay by the Respondents is reasonable and proportionate.

[48] In determining the issue of reasonableness and proportionality I had regard to the undisputed facts that:

- i. During the Pandemic a general election had been held in this country in August 2020 after restrictions had been placed upon the movement of citizens including limits on public gatherings, the closure of public recreational spaces, and restricted hours of operation for businesses;
- ii. As the spread of the COVID19-virus intensified the Government took the additional step of declaring a State of Emergency by Legal Notice No. 142 on May 16, 2021. Further restrictions to freedom of movement of persons were imposed in order to reduce the spread of the virus. These measures included a curfew from nine in the evening to five in the morning (9p.m.-5a.m.) and a work from home policy. These measures coincided with community spread of the disease increasing to seven hundred and eight new cases on May 2, 2021;
- iii. Thereafter there was a decline in cases in June 2021 which plateaued during July to September 2021. From October the cases of infections rose once more and peaked in November 2021. The highest rates of infections and death occurred in November 2021;
- iv. Although the cases increased rapidly from March to May 2021 vaccines were not readily available until sometime later that year.

[49] It is apparent that there was a window between the months June to September 2021 during which it would have been less risky to hold the elections. However in fairness to the Government and the Health Authorities in particular, that window of opportunity was not foreseeable since they had to wait to see whether the measures implemented would have the desired effect of reducing the rates of infection and death. It was a proportionate and reasonable response therefore for the Cabinet to delay advising the President to issue the Writ of Elections for the bye-elections for the electoral district of Debe South.

[50] I therefore hold that the actions of the Cabinet in advising the President to issue the Writ of Elections for the bye-elections for the electoral district of Debe South some nine (9) months after the seat of the Councillor had been declared vacant was justified in the public interest as it was undertaken during a period of public health emergency. The fact that a State of Emergency had been declared a mere twelve (12) days after the death of Mr. Singh, the rapid community spread of the disease and the lack of vaccines were a proper basis to delay the advice to the President to issue the Writ of Elections for the bye-elections for the electoral district of Debe South.

[51] In determining the issue of delay and/or unreasonable delay, the Court must have regard to the circumstances giving rise to the said delay. In **Amherst v James Walker**<sup>21</sup> Oliver J opined:

*“The expression “unreasonable delay” does ... mean something more than “prolonged delay” and it may ... be used to express the notion either for delay for which no acceptable reason can be advanced or delay which no reasonable man would incur acting in his own interest. But if this is its meaning then the absence of reason has no necessary relation to duration. If on the other hand ... the phrase is used to describe such delay as it would not in the circumstances be reasonable to expect the other party to put up with, then it seems to me that it contains within it, by necessary implication, the notice of hardship or prejudice for how otherwise is the other party harmed by it.”*

[52] Further in **Wilbert Lovell v Public Service Commission**<sup>22</sup> Dean-Armorer J (as she then was) stated:

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<sup>21</sup> [1983] 2 All E.R. 1067 at 1075 D

<sup>22</sup> **C.V.2017-03623** at paragraph 33

*“The issue of unreasonable delay falls to be assessed according to the Wednesbury principle, that is to say, whether the delay is so extensive that no reasonable Commission would have been guilty of it. As with all other grounds of irrationality, the Claimant, who relies on the ground of unreasonable delay must surmount a high threshold.”*

[Emphasis added]

[53] The authorities all establish that unreasonable delay connotes not simply a lapse of time but a lapse which is longer than it should have been and for which no reasonable explanation can be given for it<sup>23</sup>.

[54] Although on the facts of this case I have held that the delay by the Cabinet in advising the President was justified in the public interest it should be stated that a delay such as this under ‘normal’ circumstances would not be justifiable having regard to the importance of voting to a representative democracy as noted by the Board in **Ravi Balgobin Maharaj**<sup>24</sup>:

*“The rights conferred by a democratic system of government are not only individual rights enjoyed by each person entitled to vote. It is also the right of all members of the relevant community to be governed by representatives chosen democratically, whether or not individually they are entitled to vote or have exercised that right.”*

[55] The election of Representatives, whether local or national is foundational to a democratic society, engaging other constitutional rights such as the right to freedom of expression and association. Electors are entitled to vote for their Representatives either when the elections are statutorily due or as in this case when such elections arise upon the death of the Representative. It is my view that the **MCA** contemplates that within a reasonable time of the notice of vacancy being given, a Writ of Elections should be issued. But for the shocking circumstances of an unexpected Pandemic, nine (9) months would have been considered unreasonable.

[56] I do not consider that this case was a hopeless one at the outset having regard to the important public interest element as outlined above. In all of the circumstances the Applicant was entitled to

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<sup>23</sup> **Cooper and Balbosa v Director of Personnel Administration** HCA No. S-1264 of 2003

<sup>24</sup> [2023] UKPC 17 at paragraph 32

file this application and to obtain clarity on the issue. Had the delay been not reasonable, had I found the delay to be unreasonable I would have granted the Declarations notwithstanding the fact that elections had already taken place due to the fact that the issue raised was one that was justifiable in the public interest.

[57] In the circumstances, I make the following Orders that:

- i. The Application for Judicial Review of the decision of the Cabinet to delay advising the President to issue the Writ of Elections for the bye-elections for the electoral district of Debe South is dismissed.
- ii. No Orders for costs.

**Joan Charles**

**Judge**