

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2006-02658

BETWEEN

CLIVE STEPHENS

CLAIMANT

AND

THE TRINIDAD AND TOBAGO DEFENCE FORCE

DEFENDANT



JUDGMENT

Before The Hon. Madam Justice Pemberton

Appearances:

For the Claimant: Mr. S. Ramnanan

For the Defendant: Ms. N. Bansee instructed by Ms. S. Bridgemohansingh

[1] INTRODUCTION

Mr Clive Stephens is a member of the Trinidad and Tobago Defence Force of Trinidad and Tobago. During training exercises, he sustained injuries. The Defence Force convened and heard an enquiry

into the incident and made certain findings. Mr Stephens was desirous of being made privy to the Reports of the proceedings. He made a request pursuant to his right of access to information under the **FREEDOM OF INFORMATION (FOI) ACT**. He has not received the information or an explanation from The Defence Force of Trinidad and Tobago as to why the information requested has not been supplied.

There was no response to his request. Mr. Stephens felt compelled to bring this action seeking an order of Mandamus that copies of the Reports be released to him. He further asked the court for a declaration of his right to the requested information and that the information be supplied to him within seven days should he be successful. In the alternative, Mr Stephens requested that the Trinidad and Tobago Defence Force prepare a notice of its decision whether they would have supplied the documents or not, a declaration that there was unreasonable delay in providing the requested information and the usual requests for costs and further or other relief.

The Defence Force in its response was of the view that there was good reason for not responding to the request. These reason were confidentiality of the proceedings and the imprudence of releasing them to Mr. Stephens. No reason was given for not communicating this to Mr Stephens. In addition, The Minister of National Security filed a Certificate, which stated that non-disclosure of the information would have compromise the defence of the State.

I allow Mr Stephen's claim for a declaration that there was unreasonable delay in providing the requested information, that the Defence Force do prepare and forward to him a Section 23 Notice and that he is entitled to part of the costs in this matter.

My reasons for so doing are:

- (1) The Minister's Certificate given pursuant to Section 25 (3) of the Act creates an effective barrier to an order to provide information;
- (2) The provisions of Sections 14, 15 and 23 are mandatory and must be followed by the Defence Force;
- (3) Although there was not full and frank disclosure that does not drive Mr Stephens from any relief whatsoever;
- (4) This non-disclosure, coupled with limited success on the matter are sufficient to affect his entitlement to full costs.

[2] **BACKGROUND**

Mr Clive Stephens is a member of the Trinidad and Tobago Defence Force. During training at a staged Battle Exercise conducted by The Trinidad and Tobago Defence Force on 22nd November 2003 at the village of Wallerfield in East Trinidad, he sustained three (3) gunshot wounds. The Defence Force convened a Board of Inquiry to enquire into the incident. This Board deliberated and made certain findings, which formed a report to the Commanding Officer of The Trinidad and Tobago Regiment.

[3] Mr. Stephens made an application on 9th June 2006 to the Trinidad and Tobago Defence Force for copies of three reports made by the Board. There was no response to his request. He then made an application to The Trinidad and Tobago Defence Force under Section 13 of the **FREEDOM OF INFORMATION ACT**¹ for copies of the Board's Reports to be released to him. These reports were made on 24th December 2003, April and June 2005 and May 2006. To date the requested information has not been supplied.

[4] On 12th September 2006 Mr Stephens caused an application to be filed seeking Judicial Review under the Act². Leave was granted on 28th September 2006. The reliefs claimed were as follows:

- (1) Mandamus to compel the Defence Force to provide the requested information;
- (2) A Declaration that Mr Stephens is entitled to the requested information;
- (3) An Order directing the provision of the requested information within Seven (7) days of the date of the Order;

Alternatively:

- (4) Preparation of Notice under Section 23 of the **FREEDOM OF INFORMATION ACT**;
- (5) A Declaration of unreasonable delay in the provision of the requested information;
- (6) Costs;

¹ ACT NO. 26 of 1999 Section 13 (1) of the Freedom of Information Act states:

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 Section 39(1) states: for the removal of doubt, a person aggrieved by a decision of a public authority under this Act may apply to the High Court for Judicial Review of the decision.

(7) Further or other Order as meet the justice of the case.

[5] The Defence Force responded to the Application, indicating that the Trinidad and Tobago Defence Force was of the view that the request for the information requested could not be satisfied for cause. Brigadier Edmond Dillon, Chief of Defence Staff, gave the reasons for that conclusion. Brigadier Dillon swore an affidavit in which he detailed the nature and functions of Boards of Enquiries, the mandate of the particularly appointed Board in Mr Stephens's matters, and the reasons for not supplying Mr. Stephens with the requested information, the reasons for non-disclosure. Those reasons given were the confidentiality of the contents of the documents and the imprudence of releasing them to Mr. Stephens³. No reason was given for **not** communicating its decision to Mr Stephens.

[6] Mr Ramlogan responded to this by raising the following issues:

- (i) That Trinidad and Tobago Defence Force could not rely on the exemption provisions in Part IV of the **FREEDOM OF INFORMATION ACT**;
- (ii) That Section 35 which softens the impact of an exempted document in stated circumstances was not observed;
- (iii) That Mr Stephen's should not be penalized for the Defence Force's failure to respond;

³ Section 32(1) states: court document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to a Public Authority, and

- (a) the information would be exempt information if it were generated by a public authority; or
- (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.

- (iv) That the failure to disclose to the court a pending negligence claim filed previously to these proceedings against this Defendant does not affect the validity of these proceedings.

[7] The Defence Force countered this. Ms. Dilraj of the Chief State Solicitor's Department provided details of another action filed by Mr. Ramlogan on Mr Stephen's behalf, complete with annexures⁴. Ms Deowattee Dilraj deposed that this pending matter was related to the case at bar since the incident sought to be addressed therein arose out of the same circumstances. In that case Mr Stephens sought against the Trinidad and Tobago Defence Force the following relief:

- (i) Damages including aggravated and/or exemplary damages for personal injuries and consequential loss caused by the negligence of the Defendant (The Attorney General of Trinidad and Tobago) in providing for the safety of the (Plaintiff) while he was engaged upon his work/duties;
- (ii) Interest at such rate and for such period as the Court may deem just;
- (iii) Costs;
- (iv) Such further and/or other relief as the court may think just and appropriate.

[8] Ms Dilraj detailed the progress of that matter culminating at paragraphs 10 and 11 of her affidavit, which read as follows:

- 10. On 12th September 2006, the Claimant filed a Summons dated 12th September 2006 with a returnable date of 7th

⁴ See HCA 1048/05

December 2006, for leave to enter judgment against the Defendant for failure to file a defence within the prescribed time.

11. On 7th December 2006, Master Doyle sitting in the Master's Court at Sub-Registry, San Fernando entered an Order in terms of the Summons dated 12th September 2006 with the Claimant to make an application for assessment and should the matter be settled, leave to be sought to withdraw the application for assessment.

[9] In further support of The Trinidad and Tobago Defence Force's position on its failure to supply the requested information, on 5th April 2007 The Honourable Minister of National Security filed a Certificate pursuant to Section 25(3)⁵ of the Act. Certificate made pursuant to Section 25 (3) of the Act signed by the Honourable Minister of National Security, which read as follows:

This is to certify that:

- (1) Corporal Clive Stephens was shot three (3) times during a Defence Force Battle Exercise on 22nd December 2003 in Wallerfield, Cumuto.
- (2) All documents arising out of the Board of Inquiry convened to investigate the said shooting of Corporal Clive Stephens contain information the disclosure of which is likely to prejudice the defence of the Republic of Trinidad and Tobago.

⁵ Section 25(3) states: for the purposes of this Act, a certificate signed by the Minister certifying that a document as described in a request would, if it existed, be one of a kind referred to in subsection (1) or (2), established that if such a document exists, it is an exempt document.

- (3) If the following documents exist, they contain information the disclosure of which is likely to prejudice the defence of the Republic of Trinidad and Tobago: three (3) Board of Inquiry Reports into the incident on the 22nd December 2003 done on or about the 24th December 2003, April to June 2005 and May 2006.

[10] **REASONING AND ANALYSIS**

**CLAIMS FOR MANDAMUS AND ENTITLEMENT TO AND ORDER FOR REQUESTED INFORMATION
WHAT IS THE EFFECT OF THE CERTIFICATE?**

The question is, does the Certificate under Section 25 (3) operate as a complete bar to these proceedings or affect the nature of the relief claimed? The short answer to this question is yes. The Minister's Certificate given under Section 25 (3) creates an effective bar to any order of this court for production. In any event I do not think that the facts and circumstances of this case convince me to interfere with The Trinidad and Tobago Defence Force's position of non-disclosure for cause, as provided by Section 32(1)⁶. I therefore deny Mr Stephen's request for Judicial Review relief on grounds (1), (2), (3).

⁶ Section 32 see *infra* f.n. 3

[11] **SECTION 23 NOTICE, DECLARATION OF UNREASONABLE DELAY AND COSTS.**

Section 3⁷ details the object of the Act, which is to give to a member of the public a statutory right to access information held by public authorities limited only by “exceptions and exemptions necessary for the protection of essential public interests”. There is no issue that the Trinidad and Tobago Defence Force is a public authority affected by this Act. This right to receive information by the public is further concretized in Section 11⁸ of the Act which mandates the public authority to provide the information.

[12] Section 13⁹ deals with the requests for access, which was followed by Mr Stephens. Sections 14 and 15¹⁰ place on the public authority

⁷ Section 3 (1) provides that “the object of the Act is to extend the right of members of the public to access to information in the possession of public authorities by –

- (a) making available to the public information about the operations of public authorities and, in particular, ensuring that the authorizations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorizations, policies, rules and practices; and
- (b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

⁸ Section 11 (1) states “ notwithstanding any law to the contrary and subject to the provisions of this Act, it shall be the right of every person to obtain access to an official document.

(2) Nothing in this Act shall prevent a public authority from –

- (a) giving access to documents or information;
- (b) amending documents,

other than as required by this Act where it has the discretion to do so or where it is required to do so by any written law or order of a court.

⁹ Section 13 (1) states “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.”

¹⁰ Section 14 (1) A public authority shall take reasonable steps to assist any person who -

duties to assist the applicant for the information, and to respond whether approving or denying the request within a thirty (30) day time frame. Further, Section 23 demands that the public authority “shall cause the applicant to be given notice and in writing of its decision ... specifying what the notice is to contain.

[13] It is obvious that Trinidad and Tobago Defence Force has not complied with this provision and has not done so to date. Instead, Trinidad and Tobago Defence Force chose to employ Section 25¹¹ to defeat Mr Stephen’s request.

[14] The Trinidad and Tobago Defence Force must still bear responsibility for its inaction. I find that the Trinidad and Tobago Defence Force ought, however to have at least acknowledged Mr Stephen’s request for the information. Further, even though the Minister’s Certificate has effectively barred a court from granting an order to produce and supply the requested information, The Trinidad and Tobago Defence Force ought to have informed Mr Stephens of their decision not to supply the information and reason thereof, being the status of the

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- (a) wishes to make a request under Section 13; or
 - (b) has made a request which does not comply with the requirements of Section 13 (2), to make a request in a manner which complies with that section.
- (2) Where a request in writing is made to a public authority for access to an official document, the public authority shall not refuse to comply with the request on the ground that the request does not comply with section 13 (2), without first giving the applicant a reasonable opportunity of consultation with the public authority with a view to the making of a request in a form that does comply with that section.
- (3) Without prejudice to section 21, a public authority shall take reasonable steps to assist any person in the exercise of any other right under this Act.

Section 15. A public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not later than thirty days after the day on which the request is duly made.

¹¹Section 25 (1) provides that a document is an exempt document if it contains information, the disclosure of which would be likely to prejudice the defence of the Republic of Trinidad and Tobago.

document. These are mandatory statutory requirements. They are therefore in breach of their statutory duties to this extent.

[15] I do find that The Trinidad and Tobago Defence Force did not observe the provisions as to time as stated in the Act¹² and that there was an unreasonable delay in providing the information to Mr Stephens.

[16] **NON DISCLOSURE**

There are two approaches to take to this issue of non-disclosure:

- (1) In relation to Mandamus;
- (2) In relation to Filing Instructions.

[17] **OTHER ISSUE - NON-DISCLOSURE AND ITS EFFECT ON THE RELIEF FOR MANDAMUS**

Should the non-disclosure of the pending action at the leave stage entirely dispose of this application and were the non-disclosed facts material to the relief claimed?

That there is a duty of full and frank disclosure is not open for argument. There is no dispute that there was a matter already filed between these parties arising out of this incident. I do not think that the fact of non-disclosure of the pending action is sufficient to shut out Mr Stephens from the chair of relief.

¹² Section 15 states: a public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not later than thirty days after the day on which the request is duly made.

[18] **CIVIL PROCEEDINGS RULES (CPR)**

Part III of the Filing Form deals with Related Cases. Attorneys are required to complete this part. A related case which is pending is defined therein and includes a case growing “out of the same event or transaction”. There can be no doubt that this captures the negligence action. This part was completed at the outset of this matter with the words “No related cases”, notation that was clearly incorrect. The effect of this however is not to drive Mr Stephens completely from the seat of relief.

[19] **COSTS**

I set a costs budget in this matter of \$115,000.00. From my findings above I am of the view that the Respondent must pay the Applicant’s costs. The costs to be recovered must reflect:

- (1) That Mr Stephens was successful on the alternative reliefs; and
- (2) That there was non-disclosure, which while not sufficient to warrant an entire dismissal must be recognized in the award of costs.

[20] In that regard, I do think that Mr Stephen’s costs award should be reduced by 35%. I now invite Mr Stephens to present his budget for actual costs incurred not to exceed the sum of \$74,750.00.

ORDER

- (a) The Trinidad and Tobago Defence Force do prepare a Section 23 Notice for Service on Mr Stephens within seven days of the date of this Order;
- (b) That Trinidad and Tobago Defence Force do pay 65% of Mr Stephen's costs in this matter;
- (c) **IT IS NOW DECLARED** that there was an unreasonable delay in the Trinidad and Tobago Defence Force responding to Mr Stephens causing him to make this application;
- (d) Costs -
 - (i) That Mr Stephens do present a statement of his actual costs incurred not to exceed \$74,750.00 on or before 29th June 2007;
 - (ii) That Trinidad and Tobago Defence Force do file any answer on or before 13th July 2007;
 - (iii) Determination of costs set for 20th July 2007.

Dated this 14th day of June 2007.

CHARMAINE PEMBERTON
HIGH COURT JUDGE