Neutral Citation Number: [2022] CA (Bda) 20 Civ

Case No: Civ/2021/10

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 065

Sessions House
Hamilton, Bermuda HM 12

Date: 21/12/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL SIR ANTHONY SMELLIE

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Between:

DETECTIVE SERGEANT DAVID BHAGWAN

Appellant

- and -

(1) STEPHEN CORBISHLEY (COMMISSIONER OF THE BERMUDA POLICE SERVICE (BPS))
(2) MARTIN WEEKS (ASST. COMMISSIONER OF POLICE, INTERVIEW PANEL CHAIRMAN),
(3) ANTOINE DANIELS (ASST. COMMISSIONER OF POLICE, INTERVIEW PANEL MEMBER),
(4) MICHAEL TROTT (BPS HUMAN RESOURCE MANAGER, INTERVIEW PANEL MEMBER),
JOHN PAYNE (INTERVIEW PANEL MEMBER)

Respondents

Mr. Philip J Perinchief of PJP Consultants for the Appellant
Mr. Allan Doughty and Miss Safia Gardener of MJM Limited for the Respondents

Hearing date: written submissions on costs filed on 1, 5 and 21 July 2022

JUDGMENT ON COSTS

SMELLIE JA:

1. By judgment delivered on 17 June 2022, (the "**Judgment**") this Court dismissed the Appellant's appeal against a judgment of the Chief Justice which refused his application for judicial review of the decision of the First Respondent (the "**Commissioner**") not to promote him to the rank of Inspector within the Bermuda Police Service.

2. Written submissions as to the costs of the appeal were invited and those having been eventually received, this is the judgment on costs.

3. The submissions presented on behalf of the Appellant by Mr Perinchief and those on behalf of the Respondents by Mr Doughty, are starkly opposed.

4. Mr Perinchief submits that "*there ought to be no order as to costs, primarily as the fundamental issues were matters of public importance*", and that "*It is of immense 'public importance', and in the interests of national safety and security, that the public have supreme confidence in "an assessment process and regime" that consistently ensures that it is serviced by well trained and accurately assessed police officers through each and every rank, individually and collectively. This was such a case. A case where one officer, the Appellant officer Bhagwan, was notwithstanding limited financial means, bold and brave enough to take on (sic) both for himself of course, and indeed for current and future officers coming through the ranks and being assessed "on merit" via the prevailing assessment processes."*

5. Its hyperbolic bent aside for the moment, this is taken as an argument for invoking the Court's discretionary jurisdiction to make no order as to costs and so avoid imposing an order for costs upon the unsuccessful Appellant because of the general public interest in the issues said to be raised by his appeal.

6. Mr Perinchief concludes his written submissions in these terms: "*The justice of this case, when considered in the round, should not follow the usual outcome of awarding the "winner" costs. In our respectful submission, the Appeal was properly and earnestly brought, and the circumstances of same ought not to attract a cost award to any party, but rather should be settled with a "no order as to costs" award. Any adverse award would or could deter other erstwhile litigants from lodging meritorious Appeals in the future*."

7. This "general public interest" principle is clearly recognised and explained in the case law, most recently by this Court in ***Tucker v Public Service Commission and Board of Education*** [2020] CA (Bda) Civ 13, judgment delivered 27 August 2021, at [41] to [47]. I will return to consider whether the principle might properly be applied in relation to this appeal. On behalf of the Respondents, as already noted, the position taken by Mr Doughty is diametrically opposed.

8. First, he argues for an order for costs against the Appellant on the indemnity basis, relying upon dicta from the Supreme Court in ***Phoenix Global & Another v Citigroup Fund Services &***

Another [2009] Bda LR 70 (SC) and citing what he describes as "*exceptional circumstances, involving grave impropriety on the part of the Appellant and his lawyer, going to the heart of the action and affecting its whole conduct*."

9. Secondly Mr Doughty seeks to invoke this Court's jurisdiction for the imposition of a wasted costs order upon Mr Perinchief himself. This he proposes on the basis of the judgment of this Court in ***Kimathi & Another v Attorney General et al*** [2017] CA (Bda) 9 Civ, 17 November 2017, and what he describes as Mr Perinchief's unreasonable and improper conduct of the action both before this Court and below in the Supreme Court, conduct which he asserts has caused the Respondents to incur unnecessary costs. The order that he seeks is that Mr Perinchief be ordered to show cause why he should not be ordered to pay wasted costs to the Respondents in the amount of 30% of the overall indemnity costs payable to the Appellant, unless he concedes the issue, and that, in the event that he is ordered to pay wasted costs, that the amount of costs payable by the Appellant be reduced by the amount for which Mr Perinchief is personally liable.

10. I will address this alternative argument first, explaining why it may not be accepted.

11. In ***Kimathi,*** this Court, per Kay JA (at pp 6 to 7), recognized the existence of the longstanding jurisdiction to make an award in respect of wasted costs. It is a jurisdiction which is both inherent to the courts, as explained authoritatively in ***Myers v Elman*** [1940] AC 282, and, as explained in ***Kimathi;*** vested by virtue of the procedural provisions of the Rules of the Court of Appeal, to award wasted costs in appellate proceedings. In ***Kimathi***, Kay JA also explained the threefold test in Bermuda for the imposition of a wasted costs order. Following the formulation from ***Ridehalgh v Horsefield*** [1994] Ch 205 (CA) (at pp 232-233), Kay JA postulated the test as follows:

> "*i. Has the legal representative acted unreasonably or improperly?*
> *ii. If so, did such conduct cause the applicant to incur unnecessary costs?*
> *iii. If so, is it, in all the circumstances, just to order the legal representative to pay the whole or part of the relevant costs?*"

12. Kay JA regarded the first limb of the test (suggested by the arguments in ***Ridehalgh*** by reference to section 51(7) of the UK Supreme Court Act as including negligent acts or omissions on the part of the lawyer as a free standing basis for an order) as being qualified by Order 62 Rule 11 of the Rules of the Supreme Court where, in codifying the jurisdiction, negligence is omitted. He explains this, at [16], on the basis that the concept of negligence in this context "*will usually add little to "unreasonable".* This, it is worthy of note, is a sentiment which appears to accord with views expressed by Bingham JA (as he then was) in ***Ridehalgh*** itself ***(***at p 233 B) where he said on behalf of the Court of Appeal:

> "*.. for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession… We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by*

definition) unreasonable. We do not think any sharp definition between these expressions is useful or necessary or intended."

13. In ***Kimathi***, on clear and undisputed facts, and with the principles explained above in mind, the Court of Appeal of its own motion raised the enquiry and came to conclude that there was abundant evidence that the respondent lawyer, Mr Johnston, conducted the appeal both unreasonably and improperly by continuing to act in the matter while being ineligible to practice.

14. More particularly, it was held at [31], that "*the truly unreasonable and improper conduct began on 1 October 2017. He (Mr Johnston) must have known that, from that day, his firm had no indemnity cover and, therefore, could not satisfy the condition which permits practice. By the Bar Council's letter of 11 October 2017, he was told to "cease and desist operating legal services" until he had submitted proof of cover. He was also told that he should arrange for clients to be represented by another firm, "particularly those who have pending cases*".

15. The wasted costs occasioned by the postponement and delay of the appeal and which were a direct result of Mr Johnston's unreasonable and improper failure to comply with those directives, were the subject of the order made against him and his firm (of which he was sole proprietor).

16. It is nonetheless, clear from the three-stage test itself, that an enquiry into whether a wasted costs order might be justified will be a fact sensitive exercise.

17. In recognition of this, one sees from all the cases, the requirement of procedural fairness that the subject lawyer be given adequate notice of the intent of a party to seek or of the court of its own motion to impose, an order for wasted costs.

18. Adequate notice will include an opportunity to show cause by being informed clearly what is the conduct or omission being called into question. As stated in ***Ridehalgh*** at 239 B-C:

> ""*Show cause"*
> *Although Ord 62, r 11(4) in its present form requires [as does the equivalent Bermuda rule][1] that in the ordinary way the court should not make a wasted costs order without giving the legal representative "a reasonable opportunity to appear and show cause why an order should not be made," this should not be understood to mean that the burden is on the legal representative to exculpate himself. A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not. But the rule clearly envisages that the representative will not be called on to reply unless an apparently strong prima facie case has been made against him and the language of the rule recognizes a shift in the evidential burden."*

[1] Order 62 rule 11(4) of the Rules of the Supreme Court provides that: "Subject *to paragraph 5 [which deals with filings on the part of the legal representative himself which prevent or impeded the enquiry] before an order may be made under paragraph (1)(a) [for wasted costs] the Court shall give the attorney a reasonable opportunity to appear and show cause why an order should not be made.*"

19. In my view, real concerns about procedural fairness arise in this case from the manner in which Mr Doughty seeks to invoke the wasted costs jurisdiction for the first time in his written submissions on costs, filed, as mentioned above, some months after the conclusion of the appeal. To the extent that the conduct sought to be impugned relates extensively also to the conduct of proceedings in the court below, the concerns arise *a fortiori* because, as the case law also instructs, "*the relevant discretions are vested in, and only in, the court conducting the relevant hearing*", see ***Ridehalgh*** , at page 239 H.

20. By way of *ex post facto* analysis undertaken in his written submissions, Mr Doughty variously alleges and argues as regards the proceedings below and these on the appeal, that Mr Perinchief deployed "*Misleading submissions*"; "*Abuse(d) Assistant Commissioner of Police Weeks in his capacity as a witness*"; "*Abuse(d) the process (of the Court) in raising points of appeal that were unarguable on account of (Mr Perinchief's) own errors*" and "*Abused (the) process in taking issue with the Chief Justice's choice to not cite PC Estwick and PS Butcher's opinion evidence in his ruling*".

21. Whether these allegations can be made good to the necessary standard and burden of proof would involve a factual enquiry which is not given to being conducted simply by having regard to the arguments and counter-arguments in written submissions. And to the extent that they relate to the proceedings below, they should have been raised before the Chief Justice for his determination if he so resolved upon delivery of his judgment and after giving Mr Perinchief adequate notice of the concerns and an opportunity to address them, if needs be including by asking his client to waive any applicable legal professional privilege.

22. To the extent that the allegations relate to the proceedings on the appeal, similar strictures would have applied, had the allegations been raised more timelily when the Judgment was delivered or at any rate by notice to show cause issued before now.

23. Concerns about fairness will arise, in circumstances, for instance, where the lawyer may be constrained by legal professional privilege from explaining why he conducted or failed to conduct himself in a particular manner in the action. Kay JA had such constraints in mind in ***Kimathi,*** where, although not at issue on the plain facts of the case, at [29] he cited the following dictum from Lord Bingham in ***Medcalf v Mardell*** [2003] 1 AC 120:

> "*Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the Court should not make an order unless, proceeding with extreme care, it is (a) satisfied that the practitioner could say, if unconstrained, nothing to resist the order and (b) that it is in all the circumstances fair to make the order.*"

24. Earlier in ***Ridehlagh,*** the constraints of privilege had been given cautionary recognition in these terms, at page 237 B-D:

> "The *respondent lawyers are in a different position [from the lawyers of the party seeking to have a wasted costs order imposed]. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise*

the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received…. Judges who are invited to make or contemplate making a wasted cost order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."

25. While Mr Perinchief merely alluded (at page 3 of his lengthy reply submissions of 6 September 2022) to being constrained by his duty to represent his client in keeping with his instructions, the cautionary advice of the case law prevents this Court from passing on the allegations of personal impropriety against Mr Perinchief, without affording him the allowance that he might have been acting while so constrained. This is especially as regards his challenge to ACOP Weeks' credibility and his undeniably intemperate and inappropriate use of language in criticizing the Chief Justice's conclusions.

26. Mr Perinchief would be well advised to be more constrained, less hyperbolic, vituperative and prolix in the presentation of his arguments. However, it must also be recognized, as Bingham JA reminded at ***Ridehalgh*** page 236 G, that " *advocacy is more an art than a science and cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him".*

27. This is certainly not an issue given to adverse determination in this case, in the absence of a proper inquiry, including as to whether or not Mr Perinchief was acting strictly in keeping with his client's instructions. Primarily for the foregoing reasons, I would dismiss the application for an order for wasted costs.

28. I would add that I do not, in any event, see how the conduct on the part of Mr Perinchief could in any event, have justified the imposition of an order against him personally, given the wholly exceptional nature of the remedy.

29. It must be remembered that it is a remedy which is intended to compel attorneys to compensate a party to litigation other than the client for whom he acts, for costs incurred by that party as a result of acts done or omitted by the attorney in his conduct of the litigation. While it is in the public's interest that lawyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's opponents, an equally important and competing public interest is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponent's lawyers. See ***Ridehalgh*** at pages 255 F and 226 C-D.

30. While those public interests imperatives are to be observed, it is also in the public interests that lawyers should not too readily be embroiled in litigation which questions the manner in which they seek to represent their clients.

31. However ill-advised, unrestrained, or intemperate Mr Perinchief's arguments turned out to be, they were plainly only arguments and Mr Doughty's submissions on wasted costs revolve around his dissection of those arguments. In effect, his submissions amount to a proposition that Mr Perinchief should be penalised in costs on account of having pursued a hopeless case on behalf of his client. Such a simplistic approach is itself deprecated in the case law. ***Ridehalgh is*** clear about this**,** explaining at page 232 F that "…. *conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.*" And further, at page 233 F: "A *legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail*".

32. In light of all the foregoing, this application for wasted costs is, in my view, misconceived and should not have been made.

Indemnity costs

33. Rather than as a mark of the Court's disapproval of a lawyer's conduct of proceedings, the focus here is upon whether the successful Respondents to the appeal should have their costs paid by the unsuccessful Appellant, on account of his or his lawyer's improper or unreasonable conduct of his appeal, on a more favourable basis so far as the onus or proof as to reasonableness is concerned**.** While an indemnity costs order implicitly carries the court's disapproval of the lawyer's or party's conduct of litigation, its purpose is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made – see ***Three Rivers District Council and Others v Bank of England*** [2006] EWHC 816 (Comm) at [14] per Tomlinson J citing ***Petrotrade Inc v Texaco Ltd*** (Note) [2001, [2002] 1 WLR 947, per Lord Woolf MR, at p 949 and ***Victor Kermit Kiam 11 v MGN Ltd*** [2002] EWCA Civ 66 at para 12, [2002] 2 All ER 242 per Simon Brown LJ.

34. The principles applicable in Bermuda, for the award of costs on the indemnity basis, were very recently reviewed and reaffirmed by this Court when it was explained that they are the same as those longstanding principles applicable in England and Wales. See ***St John's Trust Company (Pvt) Limited v Medlands (Ptc) Limited and Others***, [2022] CA (Bda) 18 Civ, ruling on costs delivered on 2 November 2022.

35. There, it was explained that ***Phoenix Global Fund Ltd v Citigroup Fund Ltd v Citigroup Fund Services (Bermuda) Ltd*** [2009] Bda L.R. 70 (a case cited but only relied upon reservedly here by Mr Doughty), which decided that "*indemnity costs are to be reserved for exceptional circumstances involving grave impropriety going to the heart of the action and affecting its whole conduct*" did not represent the state of the law on the subject in Bermuda. This Court concluded instead at [38], that it is established that "*an indemnity costs award could be made by having regard to whether the nature of the action or the manner of its conduct was out of the norm"*.

36. Mr Doughty's reliance upon ***Phoenix Global*** reserved as it is**,** is understandable given that, at the time of filing of his submissions, as we have seen, this Court's later decision in ***St John's Trust*** was not yet delivered.

37. Indeed, he perceptively nonetheless proceeds to develop his submissions on the basis of the English case law, especially ***Three Rivers***, proposing to show that the Appellant's and his counsel Mr Perinchief's conduct of the appeal was so "*out of the norm*", as to justify the invocation of the court's discretion for the imposition of an indemnity costs order.

38. Mr Doughty accordingly relies upon the now well-known eight main indicia identified by Tomlinson J in ***Three Rivers*** (at pp 12 – 13), for guiding the court's determination whether an unsuccessful party should be required to pay costs on an indemnity basis.

39. I will not repeat them here because, their general applicability notwithstanding, I do not accept that they apply suitably to the Appellant's and Mr Perinchief's conduct of the appeal so as to justify an order for indemnity costs.

40. In short, while as I have discussed above, it may fairly be said that the appeal was conducted less than competently and in a manner marked at points by incoherence, prolixity and hyperbole spurring equally ill-measured responses from the other side and certainly without assistance to the Court, this did not rise to the level of unreasonableness or impropriety so "*outside the norm*", as to justify an order for indemnity costs.

41. It follows, in my view, that this application should also be refused.

The proper basis for the award of costs in this case.

42. The starting point as to costs, as set out in Order 62 rule 3, or as consistent with the inherent jurisdiction, is that costs follow the event except in circumstances where, in the exercise of discretion, the Court considers that some other order should be made as to the whole or any part of the costs. As explained by this Court in ***Tucker v Public Service Commission and Minister for Education*** [2020] CA (Bda) Civ 13**,** this principle applies in judicial review proceedings such as the present, as in other types of cases and, it is now settled that, in the exercise of discretion the Court may make a different order for costs where, in such proceedings, matters of general public interest are raised.

43. This is the exception implicitly relied upon by Mr Perinchief in his argument for a no costs order, as set out above.

44. I am not persuaded that such an order is justified in this case. The reason is obvious: while the Appellant time and again in his arguments sought to invoke, in support of his challenge to the promotion process, the general public interest and the wider interests of members of the Force in the proper regulation of its promotion process, in reality he was simply challenging the outcome of his own bid for promotion. His was nothing more than a personal cause and this remains clear notwithstanding that this Court was told in email correspondence that the Bermuda Police Association had agreed, to a limited extent, to underwrite the Appellant's attorney's fees.

45. And while the Appellant's challenges to the promotion process necessitated an examination by the Court of the complexities of the process, these were not found to be wanting in any significant way. Rather, the process was found to be fair and transparent, and well known to the Appellant himself who had participated in their reform and was given to fair application across the board to all candidates.

46. It was therefore hardly surprising that the Appellant had not sought to obtain, before commencing his challenge before the Court, a protective costs order on the basis that the public interest would be affected. The case law also now authoritatively requires that he should so have done, had he perceived a genuine public interest to be served by his challenge. See again ***Tucker*** at [46] where ***Bermuda Environmental Sustainability v Minister of Home Affairs*** [2014] Bda LR 68 dealing with this issue, is discussed.

47. There is however, in my view, another basis on which some amelioration of the costs may be allowed the Appellant arising from the costs implications of Mr Doughty's unsuccessful application for wasted and indemnity costs. Significant time and expense must have been taken for the production of his rather lengthy submissions on this point and it would not be just to allow their recovery against the Appellant as part of the costs of the appeal. Nor should the Appellant be required to bear Mr Perinchief's costs in responding to those unjustified applications.

48. On the other hand, the appellant is plainly the loser of the appeal. I can see no sound basis upon which the Respondents should be deprived of their costs of the appeal itself. Accordingly, the order that we should make is, in my judgment, that:

    a. the Appellant shall pay the Respondents their costs of the appeal (not including any sum in respect of the Respondents' application for the costs of the appeal);

    b. the Respondents shall bear their own costs of their application for the costs of the appeal and shall pay to the Appellants his costs of resisting that application, to be taxed on the standard scale, if not agreed.

49. I would so order.

BELL JA

50. I agree

CLARKE P

51. I, also, agree.