Neutral Citation Number: [2020] CA (Bda) Civ 13

Case No: Civ/2020/07

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. ASSISTANT JUSTICE RIIHILUOMA
CASE NUMBER 2018: No. 392

Sessions House
Hamilton, Bermuda HM 12

Date: 27/08/2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

DR GINA TUCKER

Appellant

- v -

THE PUBLIC SERVICE COMMISSION

1st Respondent

- and –

THE BOARD OF EDUCATION

2nd Respondent

Mr Mark Diel (Marshall Diel & Myers Ltd.) for the Appellant
Mr Richard Horseman (Wakefield Quin Ltd.) for the 1st Respondent
Mr. Delroy Duncan QC and Mr. Ryan Hawthorne (Trott & Duncan Ltd) for the 2nd Respondent

Hearing dates: On the papers

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JUDGMENT ON COSTS

SMELLIE JA:

1. By her Notice of Motion for Judicial Review filed on 30 November 2018 in the Supreme Court, the Appellant sought a declaration against the Respondents that the appointment of Mrs Kalmar Richards as Commissioner of Education for Bermuda made by the Governor acting on the recommendations of the Respondents, was void on the ground of illegality and that the appointment be deemed null and void. Further relief sought by the Appellant, included an order of certiorari to quash the decision of the Governor and of mandamus, requiring the Respondents to conduct the recruitment process again *"fairly and in accordance with the Education Act 1996 and the Public Service Commission Regulations 2001"*. However, as the Appellant had been appointed to another senior government post and no longer sought appointment to the post of Commissioner, she ultimately sought relief in damages.

2. By judgment of 23 July 2020, ("the Judgment") the Appellant's appeal was dismissed and the following directions given as to costs:

> "*Subject to any submissions being made to the contrary within seven days of the handing down of this judgment, the Appellant shall pay the Respondents' costs of the appeal, to be taxed at the standard rate if not agreed*."

3. No arguments were raised as to the costs of the proceedings at first instance and so no orders were made by this Court in that regard.

4. In response to the directions given in the Judgment as set out above, the Appellant now submits that there should be no order as to costs in the case, including not only as regards the appeal but also the proceedings at first instance.

5. On her behalf, Mr Diel relies on three main arguments, which may be summarised as follows:

   (i) That, relying on ***Biowatch***[1] as approved and applied by this Court in ***Barbosa***[2]***: "****In litigation between the government and a private party seeking to assert a constitutional right … ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs".*

   (ii) That, further, as the proceedings were taken by way of judicial review and raised issues which were of general public interest, the Court should exercise the discretion which it indisputably has to refuse to make a costs order against the Appellant although she was unsuccessful.

   (iii) That, as her fallback position, in keeping with what has come in the cases to be called the 'dual-party principle' , the usual rule is that an unsuccessful applicant for judicial review ought only to pay one set of costs even if she has joined more than one respondent in the application.

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[1] ***Biowatch Trust v Registrar of Genetic Resources and Others*** (CCT 80/08) [2009] ZACC 14; [2009] 5 LRC 445

[2] ***Minister of Home Affairs and Attorney- General v Barbosa*** (***Costs***) [2017] Bda 32.

6. We turn to deal with each of these arguments below but before so doing will first address the question of the costs at first instance.

7. There, Acting Justice Riihilouma on 29 January 2020, provided for the costs of the proceedings in paragraph 4 of his order as follows:

> "*The First and Second Respondent are awarded their costs which shall be paid at the standard rate, with such costs to be taxed if not agreed."*

8. The Appellant did not appeal against that order in any ground set out in her Notice of Appeal or in the submissions to this Court made on her behalf. In dismissing her appeal, it is, therefore, not surprising that the issue of costs at first instance was not addressed by this Court in the Judgment when it pronounced on costs, as set out above. The invitation for submissions as to costs has been limited by this Court in those terms. It follows that paragraph 4 of Riihilouma J's order of 29 January 2020 stands and cannot now be reviewed.

9. It follows also that the discussion which follows is limited to the costs of the appeal. It is necessary to set the context by reference to the full description of the Appellant's complaints about the appointment process, as taken from paragraph 19 of the Judgment:

> *(i) The alleged improper selection and composition of the interview panel.*
>
> *(ii) The alleged improper and ultra vires delegation by the BOE of its functions to the interview panel, including the function of short-listing candidates. The alleged delegation to the interview panel is said to be ultra vires because the panel was not a "committee" to which the BOE could delegate its functions as permitted by paragraph 12 of Schedule 1 to the (Education) Act…*
>
> *(iii) The involvement of the PS, Mrs Robinson-James, as a member of the interview panel when not herself a member of the BOE and while allegedly harbouring bias against the Appellant.*
>
> *(iv) The PSC in turn failed to conduct any form of independent process relying solely on the "flawed" recommendations of the BOE. The PSC has the following obligations which it must itself fulfill and which it failed to fulfill:*
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> *(a) To consider all applications;*
> *(b) To recommend the best candidate;*
> *(c) The PSC may recommend a candidate who lacks qualification or experience or both (as it is said of Mrs Richards by Dr Tucker), if the PSC is satisfied that the recommended candidate is of sufficient merit to enable it to make the recommendation. But here the PSC*

failed to consider that issue itself, instead simply deferring to the BOE's "flawed" recommendation."

The principle from Biowatch as applied in Holman and approved in Barbosa.

10. We begin with the recognition that this principle relates to non-frivolous actions of sufficient constitutional character or public importance to justify protecting an unsuccessful applicant against an adversarial award of costs in favour of the state. Such an action may invoke directly or indirectly, a constitutional right or remedy of personal or public interest.

11. Mr Diel, in detailed and expansive submissions, sought valiantly to persuade us that the principle applies to this case, a proposition which was with equal vigour, resisted in turn by Mr Horseman and Mr Duncan. They both submit that the Appellant's complaint was a purely personal one, alleging only breaches of procedure and due process and raised no issue of sufficient constitutional character to justify the application of this principle. For the reasons we explain below, we agree with their submissions and find that this principle (the "***Biowatch/Barbosa***" principle) is inapplicable to this case.

12. ***Biowatch*** itself involved an appeal to the Constitutional Court of South Africa by the Biowatch Trust, an environmental watchdog. The Trust had taken action in the High Court, to challenge the validity of the South African Government Registrar of Genetic Resources' (the Registrar) (and other agencies') refusal to provide information regarding the genetic modification of organic material. The Trust argued that the failure of the Registrar to provide access to the information was an infringement of its right to information in relation to constitutionally protected environmental interests. The Trust was substantially successful in its claim, but the High Court, to mark its displeasure at what it regarded as the Trust's inept requests for information, decided to make no costs order in its favour against the governmental agencies.

13. Monsanto SA (Pty) Ltd, the South African component of a multinational diversified biotechnology company involved in the research, development and sale of Genetically Modified Organisms (GMOs), together with other producers of GMOs, had resisted the Trust's quest for information and had been allowed to intervene in the litigation. Again, although the Trust was successful in its claim, the High Court held that Monsanto had been compelled by the Trust's conduct to intervene in the litigation, more particularly to prevent it from having access to confidential information which Monsanto had provided to the Registrar; and ordered the Trust to pay Monsanto's costs.

14. As Justice Sachs noted at [4] of his judgment delivered on behalf of the Constitutional Court, the net result was that, although the Trust had been largely successful in its claim against the government agencies, and even though it obtained information whose release Monsanto had strongly opposed, it found itself in the position of having to foot the bill for all its own costs, and in addition, to pay Monsanto's costs.

15. Thus, as Justice Sachs noted at the commencement of the judgment, the case before the Constitutional Court was all about costs awards and the sole issue revolved around the proper

judicial approach to determining costs awards in constitutional litigation. And at [12], in granting leave to appeal, he expressed the view that "*the present case raises matters of special constitutional concern."*

16. It was in that context that he came in the judgment on behalf of the Constitutional Court to recognize principles which, as in ***Barbosa*** (above), we are content once again to endorse and apply by way of the following summary.

17. First, after having stated at [16] that "*The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice*"; a general rule (earlier pronounced in other cases and reaffirmed by the Constitutional Court itself in ***Affordable Medicines*** [2005] ZACC 3), was again reaffirmed at [22] that where, *"in litigation between the government and a private party seeking to assert a constitutional right,… if the government loses it should pay the costs of the other side, and if the government wins, each party should bear its own costs*".

18. The rationale for this general rule was explained at [23] as being three-fold:

(i) "*In the first place, it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed, they will be deprived of their costs because of some inadvertent procedural or technical lapse*." Indeed, as Justice Sachs observed at [5] the decision of the High Court had sent *"shock waves*" throughout the community prompting a number of public interest organizations to seek leave to intervene in the litigation, so concerned were they about the potential costs consequences of constitutional claims they might raise in the future.

(ii) Thus, secondly, the general rule also recognizes the inherent public interest in constitutional litigation, since the outcome will affect the rights of those in similar situations. As Justice Sachs explained: "constitutional *litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to live in a constitutional democracy*" and,

(iii) Thirdly, the general rule acknowledges the state's primary responsibility for ensuring conformity of the law as well as its own conduct, with the precepts of the Constitution. So that "*If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door*."

19. The general rule was however, confirmed not to be unqualified or without exception , for example (at [24]):

> "*If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award".*

20. And while at [24], it is reminded that "*courts should not lightly turn their backs on the general approach*" at [25], importantly also and in our view applicable to the present application, that "*Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough to itself invoke the general rule….The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication*."

21. In ***Barbosa*** (above, at [10]), this Court adopted and applied the foregoing principles, principles which had been earlier considered and adopted by the Supreme Court as being applicable in Bermuda[3]; this Court expressing itself in the following terms (per Baker P) which we now reaffirm:

> "*In my judgment, there are compelling reasons for a different rule in constitutional cases as described by Sachs J in Biowatch. It is relevant, in my judgment that the East(ern) Caribbean Court of Appeal has followed a similar course.[4] I would therefore respectfully adopt Hellman J's above statement [from* ***Holman*** *cited at footnote 3] as a correct statement of the law. I do, however, sound this note of caution as to its application. The general rule in constitutional cases should not be applied blindly. Individual cases may involve features which justify some departure from the general rule. Often, constitutional issues will be linked with other claims. Sometimes success or failure will be partial rather than total and sometimes as in the present case, there will be an appeal. In the end, the Court has to make a just order according to the facts of the case."*

22. In seeking to persuade us of the applicability of the general rule in this case, Mr Diel relies in his submissions, on a number of African and Bermudian cases. We find that the African cases apply the ***Biowatch*** principle, refusing costs orders against unsuccessful litigants, in ways which are unsurprising, given that their respective factual contexts were readily relatable to a constitutional

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[3] ***Attorney-General v Holman*** 2015] Bda LR 93, per Hellman J. where at [16] the judge stated: *"... I am satisfied that in an application under section 15 of the Constitution the applicant should not be ordered to pay the respondent's or any third party's costs unless the Court is satisfied that the applicant has acted unreasonably in making the application or in the conduct of the proceedings. Thus if the applicant is unsuccessful each party will normally bear their own costs. However, if the applicant is successful then the respondent will normally be ordered to pay the applicant's costs.*" ***Holman*** came before this Court on appeal ([2016] Bda LR 61) but then this Court declined, in the absence of full arguments on the issue, to express an opinion on the principle on which costs should be ordered in constitutional cases.

[4] In ***Chief of Police et al v Calvin Nias*** (2008) WIR 73 , also earlier applied by Hellman J in ***Holman*** (above).

cause of action, whether directly or indirectly.[5] For instance, in ***Afriforum*** (above, at fn 5) the claim was for access to information under the Promotion of Access to Information Act 2000 but as the legislation had been enacted so as to give effect to a constitutional right, the unsuccessful claimant was deemed protected against an adverse award of costs. And, in ***Limpopo Legal Solutions*** (also cited at fn 5), while the Constitutional Court unreservedly dismissed the applicant's case, it held that because what was behind the case was the Government's constitutional duty to "*take reasonable legislative and other measures to protect the environment and to provide access to healthcare'*, the ***Biowatch*** principle applied.

23. Described by Mr Diel as the apotheosis of support from the African cases for the Appellant's case, reliance is also placed upon ***Helen Suzman Foundation v Judicial Service Commission***[6]**.** But in that case too, unlike, as we have found in the case at bar, the issues were substantively constitutional in nature. The South African Constitutional Court had to determine whether the Foundation, in vindication of the public interest in ensuring a transparent process for the selection of candidates for judicial appointment, was entitled, by way of judicial review, to disclosure of the Judicial Service Commissions' (JSC) deliberations during the appointment process. The central question became whether the application gave rise to any reasons, consistent with the Constitution and the law, which justified the non-disclosure by the JSC of the record of its deliberations held in private about judicial appointments. It was held that the relief sought by the Foundation would undermine the JSC's constitutional and legislative imperatives by, inter alia, stifling the rigour and candour of deliberations, deterring potential applicants, harming the dignity and privacy of candidates who applied with the expectation of confidentiality of the deliberations and generally hamper effective judicial selection. It was against the background of those findings which recognized the essential and important constitutional nature of the issues, that the Constitutional Court is recorded as declaring at [40] that: "*The JSC did not seek a costs order in the event of its success and my view is that this stance is correct in light of the Biowatch principle*".

24. The post-Barbosa Bermudian cases[7], while also of illustrative value having regard to their particular facts, in our view did not advance the Appellant's case for a no costs order. While the cases may show a willingness to apply the *Biowatch* principle, as Mr Diel proposes "*beyond the strict confines of an application to strike down a statute or government action under section 15 of the Constitution*[8] *for inconsistency with the fundamental rights provisions of the Constitution*"

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[5] ***Nokotyana and Others v Ekurhuleni Municipality and Others*** (2009) 28 BHRC 296; ***Albutt v Centre for the Study of Violence and Rehabilitation and Others*** [2010] 3 LRC 449; ***Monyeki and Another v Regional Land Claims Commissioner, Limpopo Province and other***s (LCC 18-04) [2012] ZALCC 2 (29 February 2012); ***National Commission of the South African Police Service v Southern African Human Rights Litigation Centre and others*** [2015] 3 LRC 218; ***Afriforum v Emadlangeni Municipality*** (A286-2015) [2016] ZAGPPHC 1222 (27 May 2016); ***Lawyers for Human Rights v Minister in the Presidency and others*** (CCT120-16) [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (18 May 2017).; ***Limpopo Legal solutions and Others v Vhembe District Municipality and Others*** (CCT159-16) [2017] ZACC 14; 2017 (9) BCLR 1216 (CC) (18 May 2017)

[6] [2017] 3 LRC 215

[7] ***Matthie (BPTSA) v Minister of Education and anor (Costs)*** [2016] Bda LR 111; ***Kimathi and Tucker v Attorney-General for Bermuda and Others (Costs)*** [2017] Bda LR 44; ***Sannapareddy v Commissioner of Bermuda Police Service and Attorney-General*** (Costs) [2017] Bda 77; ***Kimathi and Tucker v Attorney General and others (Security for Costs)*** [2017] Bda LR 114; ***A Law Firm and Estate of the Deceased v Com of Pol*** [2018] Bda LR 27

[8] Which in subsection (1) and the proviso to subsection (2) provides relevantly, as follows:

none cited to us has done so where there was not a genuine and substantive claim for constitutional relief, even if ultimately unsuccessful.

25. Of these cases, that most emphatically relied upon by Mr Deil is ***Sannapareddy (see fn 7)***, in respect of which he submits that although the constitutional aspect of the application was not pursued, the Supreme Court (per Kawaley CJ) "*enthusiastically applied*" the ***Biowatch/Barbosa*** principle in rejecting the Attorney General's application for what the Court termed "*the extraordinary remedy of an adverse costs order*". This is however, a simplistic view of the outcome on costs in ***Sannapareddy.***

26. In that case, while discontinuing the claim for constitutional relief, the applicant was granted, inter alia, an order quashing a decision for his summary arrest and a declaration that the search of his home was unlawful. The arrest had purportedly relied upon powers given under section 23(6) of the Police and Criminal Evidence Act 2006, Bermuda (PACE).

27. While challenging the arrest and search by way of judicial review, the applicant had also sought direct constitutional relief pursuant to section 15(2) of the Constitution, by way of a declaration that section 23(6) of PACE, if to be construed as vesting the wide powers of arrest contended for by the Attorney General, was unconstitutional.

28. It is clear from the following observations of Chief Justice Kawaley that the direct constitutional aspect of the claim could hardly have been described as frivolous, non-genuine or irrelevant; at [23]:

> "*In the present case the application for constitutional relief which was not pursued was always an alternative argument. Substantially the same constitutional law submissions were successfully deployed in support of the primary argument that the arrest was unlawful if section 23(4) was construed in light of sections 5 and 7 of the Constitution*."

29. Likewise, in ***Kimathi and Tucker (Costs)*** (above)***,*** the central question in the main action[9] had been whether the constitutional rights to freedom of expression, freedom of conscience and protection from discrimination on the grounds, *inter alia*, of political opinion, had been infringed, even while the legal focus of the enquiry was the lawfulness of the Minister of Home Affair's decision to ban a foreign lecturer from visiting Bermuda, for seeking to promote hate speech. The

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"15 (1) *If any person alleges that any of the foregoing provisions of this Chapter [(in relation to the protection of the fundamental freedoms and rights of the individual)] has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

(2) (a)…

(b)…

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

[9] [2017] Bda LR 40

Minister's decision was upheld in the main action[10], Nevertheless, in rejecting the Minister's application for costs, Kawaley CJ described the outcome on the central issue in this way, at [4]:

> "*In traditional terms it is obvious that the Respondents (including the Minister) achieved substantial success in that they prevailed on (the) main issue in controversy: the Court held that the impugned decisions did not interfere with the Applicants' freedom of expression or conscience rights to such an extent as to entitle them to constitutional relief*."

30. The learned judge then proceeded to apply the ***Biowatch/Barbosa*** principles on what may now be described as perfectly orthodox grounds, refusing costs in favour of the Minister because, inter alia, "*the Applicants are private citizens who (although) unsuccessful overall…neither acted unreasonably in bringing the present proceedings… (which have) helped to develop entirely new Bermudian law in a field of public interest"* and *"the non-constitutional issues were of limited significance in costs terms and were not entirely discrete in any event (and some were) materially shaped by the constitutional arguments*."

31. The case is, therefore, no support for Mr Diel's perception of "*a trend of expansiveness*" in the Bermudian case law on the issue of costs in constitutional cases. Rather, there was the clear dominance of the constitutional issues raised.

32. And it was therefore unsurprising that Subair Williams J., in dealing with the related application for security for costs of the appeal in ***Kamathi and Tucker v AG and others (Security for Costs)*** (above), and although having accepted that the case before her was not "*strictly speaking a constitutional matter*", nonetheless reaffirmed her earlier decision refusing an order for security for costs and found at [42] "*that this case is of sufficient constitutional character and public importance to come within the Barbosa rule on costs*."[11]

33. None of the foregoing is meant to over-emphasize the need for a constitutional label to an action. As the cases all show, what matters is the true substance of the action and as Baker P advised in ***Barbosa*** "*the general rule in constitutional cases should not be applied blindly*."

34. However, nor should the importance of applying the general rule in its proper context be overlooked. That context includes the principle that resort to constitutional claims should not be as a matter of course but only after resort to ordinary public law discretionary remedies which are available. This principle, enshrined by the proviso to section 15(2) of the Bermuda Constitution[12], was recognised by Lord Hope in ***Jaroo v Attorney-General of Trinidad and Tobago*** [2002] UKPC 5 at [39] in these terms:

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[10] ([2017] Bda LR 40) (above)

[11] In arriving at this conclusion it is notable that Subair Williams J distinguished an earlier decision of this Court, decided pre-Barbosa, in which an order for security for costs was made notwithstanding what was described per Baker P. as a "fundamental constitutional issue" to be decided in the case, but one which was regarded as affecting only the private commercial interests of the appellant. See ***Allied Trust and Allied Development Partners Ltd v AG and Minister of Home Affairs*** [2016] CA Bda 4 Civ, 18 March 2016

[12] See above.

> "39. *Their Lordships respectfully agree with the Court of Appeal, that before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all circumstances of the case, some other procedure either under the common law or pursuant to statute might not be more appropriately invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse*."

35. The circumstances of ***Jaroo*** are themselves illustrative of the rationale of the principle. Mr Jaroo's car which he had bought as a *bona fide* purchaser for value, was voluntarily handed over by him and detained by the police for investigation into whether it had been stolen. After an inordinate delay and only after Mr Jaroo had given notice of his intention to file an originating motion claiming breach of his constitutional right to his property in the car, did the police assert a right to its continued detention on the basis that there was evidence that the car was stolen. A factual dispute having thus arisen over Mr Jaroo's right to its return and the police's right of detention, Mr Jaroo was entitled to sue in detinue for its return but elected instead to proceed with his constitutional motion which was filed pursuant to section 14 of the Constitution of Trinidad and Tobago,(which for present purposes, is expressed in similar terms as section 15(1) of the Bermuda Constitution (cited above)). It was this resort to the constitutional process where an evidential dispute was engaged and could be resolved by an ordinary action, which the Privy Council deemed inappropriate. Lord Hope further explained the rationale at [29], citing the earlier judgment of the Board in ***Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265:***

> *"Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In* ***Harrikissoon*** *..., Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962:*
>
> > *"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 [(later section 14)] of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard for those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself*

> *sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom"….*

(and continuing at [36])

> *"Their Lordships wish to emphasize that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. As Lord Mustill indicated in Boodram v Attorney General of Trinidad and Tobago [1996] AC 842, 854, in the context of a complaint that adverse publicity would prejudice the appellant's right to a fair trial, the question whether the appellant's complaint that the police were detaining his vehicle was well founded was a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution. But instead of amending his pleadings to enable him to pursue the common law remedy that had always been available to him, the appellant [(Jaroo)] chose to adhere to what had now become an unsuitable and inappropriate procedure. Moreover, having decided to adhere to that procedure, he did not challenge the statements in Sergeant Flemming's affidavit that further enquiries were being undertaken which would lead to the apprehension of those concerned in the theft of the vehicle and that it was necessary to preserve it as material evidence."*

36. Applying the learning from ***Jaroo*** to the present case, we note that not only was this case not instituted as a constitutional action, but as an application to challenge the procedures and deliberations of the BOE and PSC, seeking damages and involving the contentious exchange of affidavit evidence, it was not one which could properly, in any event, have been instituted as such. To the extent therefore, that the Appellant had a right to bring that challenge (ultimately dismissed by the Supreme Court and by this Court), she was obliged to bring it as she did by way of the usual process of judicial review. A constitutional motion instead, without any real basis for constitutional redress, would have been susceptible to being struck as an abuse of process. Treating her judicial review action now - although it was one which involved no assertion of a breach of a constitutional right and invoked no constitutional remedy – as Mr Diel submits, as being nonetheless of "*sufficient constitutional character and public importance*" to come within the ***Biowatch/Barbosa*** rule on costs, would be wrong in principle and, in our view, such treatment would itself be an abuse of process.

37. For the sake of clarity, this conclusion on the facts of this case, does not suggest that a constitutional claim can only be brought under section 15 of the Constitution. As Kawaley CJ (in

Minister of Home Affairs v Bermuda Industrial Union [2016] SC (Bda) 4 Civ (15 January 2016) and Helman J (in ***Matthie (BPTSA) v Minister of Education and Anor (Costs)*** both explained, a constitutional claim may be raised in different ways, including within a judicial review application.

38. However, by whatever process raised, a claim in order to attract the protection of the ***Biowatch/Barbosa*** principle, must involve issues which are "*genuine and substantive, and truly raise constitutional considerations which are relevant to the adjudication*": ***Biowatch***, above, at [25].

39. For the same reasons, we do not accept Mr Diel's further argument, that the fact itself that the PSC is a creature of the Constitution and exercises an important constitutional function in advising on the appointment to senior public offices, brings the case within the ***Barbosa*** principle, requiring us to apply the principle "*in light of its rationale*"[13]. While this Court has now ruled that the recruitment practice of the Government of Bermuda in relation to the appointment of a very important public office is lawful and within the scope of the PSC's functions, there was no challenge to the constitutionality of those functions, nor was there any suggestion that in carrying them out, the PSC (or the BOE for that matter) in any way infringed upon any constitutionally protected right of the Appellant.

40. Such a casual assimilation, as Mr Diel proposes, of the general rule on costs for constitutional cases to this case, would also be objectionable for the further reason of non-compliance with other modern developments on costs in the field of public law and which we now turn to consider under the second limb of the Appellant's arguments.

The general public interest principle

41. Here, as outlined above, Mr Diel argues that as the proceedings were taken by way of judicial review and raised issues of general public interest, the Court should refuse to make a costs order against the Appellant although she was unsuccessful.

42. The starting point as to costs is as set out in Order 62 rule 3 of the Rules of the Supreme Court 1985 ("RSC"). It is that costs follow the event and is the same in judicial review proceedings as in other types of cases:

> "*If the Court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

43. The principles which have developed in relation to costs in constitutional cases as discussed above, may be regarded as the expression of the courts' exercise of discretion on costs, either in keeping

[13] Citing ***Thomas v A-G of Trinidad and Tobago*** [1982] AC 113; ***Duncan v Attorney General*** [1998] 3 LRC 414 and ***Cooper and Another v Director of Personnel Administration*** [2007] 1 WLR 101; each of which, in any event, involved a claim of direct infringement of a constitutional provision.

with the inherent jurisdiction[14] or in keeping with the exception provided in Order 62 rule 3. So too may other principles raised in this case, including those relating to judicial review proceedings which raise matters of general public interest.

44. This "*general public interest*" principle is sought to be relied upon here by Mr Diel, citing *Halsbury's*[15] description of it, in the following terms of which we content to approve:

> "*All courts have a discretion in regard to costs generally which must be exercised judicially. The only immutable rule in relation to the exercise of the discretion on costs is that there are no immutable rules. Subject to this, if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party although the court may make a different order.* ***There are particular considerations in relation to claims for judicial review and the courts have shown some willingness to depart from the ordinary costs principles in cases raising issues of general public interest****. It is not possible to attempt to anticipate every situation where a less orthodox approach will be considered. Suffice it to say that the courts will act pragmatically to achieve justice in relation to costs on a case by case basis*." [Emphasis added].

45. The principle is also discussed in other major textbooks, one of which ***Supperstone, Goudie and Walker,*** describes it as it overlaps also with that relating to the constitutional cases. At [20.92], the learned authors note that while under the pre-CPR rules (ie: under RSC Order 62, r 3, the equivalent of the Bermuda Order 62 r 3) there was a presumption that costs should 'follow the event', that this was no longer the case, as under CPR 44.2(2), the courts in England and Wales are now entirely free to make a different order and are encouraged to make precise orders to reflect the outcome of different issues[16]. While the rules have indeed so evolved in England and Wales, we see from the case law that the Courts in Bermuda (and indeed elsewhere in the Commonwealth where the 'old rule' still applies), that the undoubted discretion is sufficiently broad to have allowed for the development of the law on costs to adopt and reflect the developments under the CPR and elsewhere (as, for instance, in the case of ***Biowatch*** from South Africa). It is in this context that we also accept the following summary from this textbook[17]:

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[14] It has been held that the wide discretionary power to award costs is not curtailed in its exercise by the rules of court but also admits of an inherent or equitable jurisdiction to award costs: ***Aiden Shipping Ltd v Interbulk Ltd*** [1986] A.C 965; applied in the Cayman Islands in ***Bonotto and Bonotto v Boccaletti and others*** 2001 CILR 292,CA.

[15] ***Halsbury's Laws of England/ Judicial Review (Volume 61A (2018)/4 Practice and Procedure /(5) Costs/85. Costs in judicial review proceedings,*** citing , inter alia, ***Belize Alliance of Conservation Non-Government Organisations v Department for the Environment*** [2003] UKPC 63, [2003] 1 WLR 2839 and ***New Zealand Maori Council v A-G for New Zealand*** [1994] 1 AC 466, [1994] 1 ALL ER 623, PC.

[16] Citing ***Phonographic Performance Ltd v AEI Redifussion Music Ltd*** [1999] 1 WLR 1507 at 1522 in which the seminal judgment on this point in ***Re Elgindata*** **(*No 2)*** was approved ([1992] 1 WLR 1207). While there is no "issues based" approach proposed in this case, it is worth noting, for the sake of completeness, that this approach too has been recognised in Bermuda by this Court in ***First Atlantic Commerce v Bank of Bermuda Ltd*** [2009] Bda LR 18, following ***Re Elgindata.***

[17] ***Supperstone, Goudie and Walker on Judicial Review***/ Chapter 20 Procedure: Hearings and Appeals/Costs Relating to Judicial Review Hearings and Appeals/ The exercise of discretion generally. See also ***Fordham: Judicial Review Handbook, Sixth Edition 2012***, at [18.3] and the cases there cited; ***De Smith's Judicial Review*** *(8th Edition* 2020 Sweet and Maxwell) Part 111: Procedures and Remedies at [16-102], and the cases there cited.

> "*Where a matter raises a legal question of genuine public concern, the courts have sometimes held that it is inappropriate to make a costs order against a claimant, even where the judicial review is wholly unsuccessful. This approach was adopted where issues of public health and well-being were at stake and so it was important that the issues were properly examined. The court has also declined to deprive a claimant of its costs with regard to unsuccessful issues where 'fundamental human rights and the liberty of the subject' were involved such that there was a public interest in the issues beyond that of the individual parties. In those circumstances it would be wrong to discourage any party from raising any proper and reasonable argument even if it ultimately proved unsuccessful*."

46. In ***Bermuda Environmental Sustainability Taskforce v Minister of Home Affairs*** [2014] Bda LR 68, it was decided that a litigant seeking to bring litigation in the public interest could, and in an appropriate case should, do so by way of a protective costs order. This decision followed and applied authoritative guideline principles articulated by Lord Phillips MR (as he then was) on behalf of the English Court of Appeal in ***R (Corner House) v Trade and Industry*** [2005] EWCA Civ. 192[18]. The governing principles were there restated in the following terms at [74][19]:

> " (1*) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:*
>
> *i) The issues raised are of general public importance;*
>
> *ii) The public interest requires that those issues should be resolved;*
>
> *iii) The applicant has no private interest in the outcome of the case;*
>
> *iv) Having regard to the financial resources of the applicant and the respondent(s) and the amount of costs that are likely to be involved it is fair and just to make the order;*
>
> *v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.*
>
> *(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.*

[18] The principles were earlier recognized in ***Fay and Payne v The Governor and the Bermuda Dental Board*** [2006] Bda L.R. 72

[19] Since considered and further explained by the English Court of Appeal in ***R (Bug Life) v Thurrock Thames Gateway Dev. Corp***. [2008] EWCA Civ. 1209; [2009] 1 Costs L.R. 80; ***R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ. 749; [2009] 1 W.L.R. 1436.*** *The principles have also been applied in the Cayman Islands:* ***Roulstone v Cabinet of the Cayman Islands and Legislative Assembly of the Cayman Islands (National Trust for the Cayman Islands Intervening)*** 2020 (1) CILR 224.

> *(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."*

47. Here, had the Appellant believed that she was acting other than in her own interests and genuinely wished to raised "*issues of general public importance*", it is logical and reasonable to expect her to have sought a protective costs order. She could have done so at any stage of the proceedings below, or even upon the filing of her appeal, but did not do so. Nor has any ground been put forward by Mr Diel on her behalf upon which such an order could have been made. In light of the essentially personal nature of her complaints and relief sought (as described respectively above at [9] and [1]), there simply was, in our view, no basis upon which such a protective costs order could properly have been made. Similarly, given the like considerations which go to the making of a no costs order generally in cases involving the public interest (as described above from ***Halsbury's*** and ***Supperstone, Goodie and Walker***), we do not find any grounds shown here for the making of a no costs order.

The Dual-Party Principle in costs

48. This principle, most authoritatively stated by the House of Lords in ***Bolton Metropolitan District Council and Others v Secretary of State for the Environment*** (1996) WLR 1176, (***Bolton***) has been applied in Bermuda in at least two decisions, both by former Chief Justice Kawaley: ***Binns v Burrows*** [2012] Bda LR 3 and ***Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs)*** (the "***KFC case***").

49. It will suffice for present purposes to adopt the discussion of the principle in the ***KFC case,*** relying on among other authorities, the pronouncements of Lord Lloyd from ***Bolton*** [at pages 2 to 3] :

> *"... Mr Pachai [(counsel for the applicant KFC)] made good the following submission. The usual rule is that an unsuccessful applicant for judicial review ought only to pay one set of costs even if he has joined more than one respondent to his application. However, the second limb of this rule, which KFC's counsel somewhat skated over, is that two costs awards may be made where a party other than the primary respondent has some important personal interests to defend which the primary respondent (here the Minister) is not competent to address. The authorities relied upon by M Pachai which supported both elements of this approach to costs in judicial review applications were the following:* ***Bolton*** *;* ***R v Industrial Disputes Tribunal et al, ex parte American Express Co, Inc*** *[1954] 2 All ER 764 (Note);* ***R (Friends of the Earth Ltd) et al v Secretary of State for Environment Food and Rural Affairs et al*** *[2001] EWCA Civ 1950****; HLB Kidsons (a firm) v Lloyds Underwriters*** *[2007] All ER (D) 341 ; [2007] EWHC 2699 (Comm);* ***Supreme Court Practice 1999 Volume 1****, paragraph 53/14/88... In particular, he emphasized the following observation of Lord Lloyd at page 1178E of the Bolton case ... which were reproduced in this Court's Judgment in* ***Binns v Burrows*** *[2012] Bda LR 3 at page 8:*

> *'What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule…'*
>
> *"However, Lord Lloyd went on to state that when a claim is brought against a Minister and a second respondent appears, the second respondent "will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary for State; or unless he has an interest which requires separate representation*."

50. In this case, both Respondents are emanations of the state. While they had different interests in the issues in dispute, they also had a common objective - the vindication of their decisions to recommend the appointment of Mrs Richards as Commissioner of Education. The different interests in the issues in dispute, while worthy of being fully articulated and defended, were not of such disparity or complexity as, in our view, to have required representation by different counsel. It is in this regard that we accept Mr Diel's submissions on behalf of the Appellant, that it is clear that the allegations in relation to the failings of the BOE could readily and competently have been addressed by counsel for the PSC, or, as we would add, *vice versa*. For instance, while the PSC had a different regulatory role with which to comply than that of the BOE under the Education Act, the evidence and arguments in support of its compliance could equally have been presented by counsel for the BOE, while explaining the BOE's response in relation to the criticisms leveled against it. There was no conflict of interest such as to have prevented that common representation.

51. It is in this regard therefore that we find that the Appellant should be afforded some amelioration of the costs consequences of her unsuccessful challenge to the decisions of the PSC and BOE – in the application of the dual-party rule in the sense explained in **Bolton and the KFC Case.** Here there were no interests which *required* separate representation, even while we would not hold that separate representation was not desirable or reasonable.

52. In the result, we award each of the Respondents one-half of its costs, to be taxed if not agreed on the standard basis. In respect of the costs of the Second Respondent its costs in respect of counsel are limited to the costs of leading counsel only.

GLOSTER JA:

53. I agree.

CLARKE P:

54. I also agree, and accordingly we so order. We should be grateful to counsel for the Appellant to produce the Order following this judgment.