In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 399

BETWEEN:-

(1) MARTIN HOLMAN
(2) JUDITH HOLMAN
(3) CLARE ELIZABETH NEWMAN
(4) KEITH ASHLEY HOLMAN

Plaintiffs

-and-

ATTORNEY GENERAL

Defendant

RULING

(In Chambers)

Date of hearing: 13th October 2015
Date of ruling: 13th October 2015
Date of expanded reasons: 20th October 2015

Mr Peter Sanderson, Wakefield Quin Limited, for the Plaintiffs
Mr Norman MacDonald, Attorney General's Chambers, for the Defendant

Introduction

1. Any person alleging that their fundamental rights under the Constitution have been or are likely to be breached may apply to the Supreme Court for redress. But what if they lose? Who pays the costs of the application? That is the issue raised by these proceedings.

Background

2. By an Originating Summons dated 19th November 2014 the Plaintiffs claimed a breach of their rights under the Constitution and Magna Carta.

3. The Plaintiffs' case centred on representations allegedly made by the immigration authorities in Bermuda to the First Plaintiff in the early 1970s that he was not Bermudian and was not allowed to live in Bermuda without a work permit. The practical effect of these representations was said to be that in 1976 the First Plaintiff and his wife, the Second Plaintiff, were forced to leave Bermuda. Their children, the Third and Fourth Plaintiffs, were born in the early 1980s while the First and Second Plaintiffs were living in the UK.

4. Belatedly, in 1997 the immigration authorities acknowledged that the First Plaintiff has and has always had Bermudian status and in 2001 they acknowledged that the Third and Fourth Defendants have also always had Bermudian status.

5. The Plaintiffs sought constitutional damages for loss of opportunity to live in Bermuda during the "lost" years in which the Bermudian status of the First, Third and Fourth Plaintiffs was not recognised, and for their distress as a result of this injustice. They alleged that sections 11 of the Constitution, which protects freedom of movement, and section 12, which protects from discrimination, were engaged. So too, they alleged, were the rights which they claimed under Magna Carta not to be disseised of their liberties or free customs or be exiled other than by the law of the land.

6. On 8th March 2015 the Defendant issued a summons for security for costs with a return date of 16th April 2015. On 15th April 2015, the day before the hearing, the Plaintiffs issued a summons for leave to discontinue the action with no order as to costs.

7. When the matter came before me on 16th April 2015 I granted the Plaintiffs' application but reserved the question of costs. The Defendant argued that, notwithstanding that the action had not got very far, he had incurred more than minimal costs defending it and that part of these should be borne by the Plaintiffs. The Defendant sought an order for costs in the sum of $8,000, of which $3,000 was for the costs of the application for costs, although assuming a market rate his actual costs would have been substantially more.

8. I dismissed the Defendant's application in a short *ex tempore* judgment given at a hearing on 13th October 2015 at which costs were argued. I also dismissed the application for security for costs, which was now redundant.

9. At the request of the parties I am taking the opportunity to set out in more detail the principles governing the award of costs in constitutional cases.

Applicable principles

10. The general rule in civil litigation is that costs follow the event. Ie the loser pays the winner's costs. In Fay v Governor and Bermuda Dental Board (Costs) [2006] Bda LR 72 at para 5, Kawaley J (as he then was) held that constitutional cases were in general no exception.

> "*Order 62 rule 3(3) provides that 'the Court shall order the costs to follow the event, except where it appears to the Court that in the circumstances of the case some other order should be made.' Although I have previously assumed that a more flexible approach to costs was justified in public interest matters than in ordinary civil litigation, the better view appears to be that the ordinary rules apply except in cases where the applicant has no personal or financial interest in the proceedings. This appears to be the English view, as applied in the context of granting protective costs orders at an early stage in public interest litigation: R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] 4 All ER 1, [2005] 1 WLR 2600. The*

position appears to be broadly the same, in Australia, in the ordinary public law case: Save The Ridge Inc v Commonwealth [2006] FCAFC 51. However, the Federal Court of Australia in this case observed:

'[12] Where an appeal raises a novel question of much general importance and some difficulty, the appeal court may decline to order costs against the unsuccessful appellant: see Re Mersey Railway Co (1888) 37 Ch D 610 per Cotton LJ at 619, Lindley LJ and Bowen LJ agreeing at 621. …"

11. The learned Judge was not referred to any cases dealing specifically with costs in constitutional cases. If he had been, he might well have decided that his previous assumption was in fact correct.

12. The question of costs in constitutional cases has been considered in depth by the Constitutional Court of South Africa. I was referred to its decisions in Motsepe v Commissioner for Inland Revenue [1997] ZACC 3 and City Council of Pretoria v Walker (1998) 4 BHRC 324. I have also had regard to Affordable Medicine Trust and others v Minister of Health and Another [2005] ZACC 3 and Biowatch Trust v Registrar: Genetic Resources and Others [2009] ZACC 14.

13. The latter case concerned two unfavourable decisions on costs made in respect of a non-governmental body which had brought constitutional actions seeking information from government bodies. Sachs J, giving the judgment of the Court, described the case as "*all about costs awards, and only about costs awards*". He considered the principles governing the award of costs in constitutional cases at paras 21 – 25:

"*What the general approach should be in relation to suits between private parties and the state*

[21] In Affordable Medicines this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:

'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In Motsepe v Commissioner for Inland Revenue this Court articulated the rule as follows:

> *"[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interest of the administration of justice nor fair to those who are forced to oppose such attacks."' (Footnotes omitted.)*

[22] In Affordable Medicines the general rule was applied so as to overturn a costs award that had been given in the High Court against the applicants, the High Court having reasoned in part that the applicants had been largely unsuccessful and that they had appeared to be in a position to pay. Although Ngcobo J in substance rejected the appeal by the medical practitioners on the merits, he overturned the order on costs made by the High Court against them, and held that both in the High Court and in this Court each party should bear its own costs. In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the

principle that 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.

[23] The rationale for this general rule is three-fold. 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. Secondly, 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 be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. 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.

[24] At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. 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 immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.

[25] Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in Affordable Medicines. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only

be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future." [Footnotes omitted.]

14. The Court of Appeal of the Eastern Caribbean States has adopted a similar approach. Eg Chief of Police and another v Nias (2008) 73 WIR 201 concerned a successful appeal by the Attorney General of St Christopher and Nevis to the Court against a ruling by the High Court under the Constitution of that jurisdiction. Rawlins CJ addressed the question of costs at para 38 of his leading judgment.

"*The State has prevailed in this appeal. In proceedings such as this, rule 56.13(4) of CPR 2000 permits the court to make any order as to costs as appears just. However, rule 56.13(6) states that no order as to costs may be made against an applicant unless the court thinks that the applicant has acted unreasonably in making the application or in the conduct of the proceedings.* ***This mirrors the prior practice of our courts in constitutional cases in relation to a private citizen seeking to enforce constitutional rights.*** *I do not think that the applicant acted unreasonably in making the application or in the conduct of his case such as to permit the State to recover costs against him either in the High Court or in this court. Accordingly, I would make no costs order against him in either court.*" [Emphasis added.]

15. Thus rule 56 of the Civil Procedure Rules of the Court, which rule applies to public law actions generally, which it describes as "*applications for an administrative order*", adopts the prior practice regarding costs in constitutional cases.

16. Applying these authorities, 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. This is for the reasons explained by Sachs J in the Biowatch Trust case.

Disposition

17. I am not satisfied that the Plaintiffs acted unreasonably in making the application or in their conduct of the case. Their constitutional and purported Magna Carta rights were arguably engaged; judicial review, which was in its infancy during the 1970s, would not have been an apt remedy as it does not give rise to damages; and the mischief complained of, namely the non-recognition of Bermudian status and *de facto* exclusion from Bermuda, is better captured by a public than a private law action. Claims under the Constitution and, if applicable, Magna Carta are not subject to a time bar. As to the merits of the claims, I cannot say that they would have been bound to fail. As to the conduct of the action, the summons for leave to discontinue was filed at an early stage.

18. Although the Defendant was the successful party in this action he has not been awarded his costs. Moreover, the principles applicable to the award of costs in constitutional cases in Bermuda were unclear. I have therefore made no order as to the costs of the costs hearing, notwithstanding that at that hearing the successful parties were the Plaintiffs.

DATED this 20th day of October, 2015

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Hellman J