IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2016: No. 312

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN THE MATTER OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

(1) AYO KIMATHI

(2) DAVID TUCKER

Applicants

-v-

(1) THE ATTORNEY-GENERAL FOR BERMUDA

(2) THE MINISTER OF HOME AFFAIRS

(3) THE EXECUTIVE OFFICER OF THE HUMAN RIGHTS COMMISSION

Respondents

RULING
(in Court)[1]

Costs- judicial review- application for constitutional relief-correct approach to the award of costs where applicants fail to achieve substantial success

[1] This Judgment was circulated to the parties without a hearing.

Date of hearing: April 28, 2017
Date of Judgment: May 2, 2017

Mr. Eugene Johnston and Mrs. Dawn Johnston, J2 Chambers, for the Applicants
Mrs. Lauren Sadler-Best, Attorney-General's Chambers, for the 1st-2nd Respondents
Mr. Allan Doughty and Ms. Gretchen Tucker, Beesmont Law Limited, for the 3rd Respondent

Introductory

1. The Judgment in this matter handed down on April 28, 2017 concluded as follows:

> "*194. I will hear counsel as to costs and indicate in that regard that my provisional view is that this is a case to which the principles applicable to applications for constitutional relief potentially apply. These principles are most authoritatively set out in a most valuable recent Court of Appeal judgment, Minister of Home Affairs and Attorney-General-v-Barbosa [2017] CA (Bda) Civ (30 March, 2017).*"

2. The Court diary did not permit me to deliver an ex tempore ruling after hearing counsel on the issue of costs. I also omitted to express my gratitude to counsel for the assistance which their careful and well-researched arguments provided to the Court. The result of the substantive case was that the Applicants lost overall as against the Attorney-General and the Minister and that the 1st Applicant lost as against the Executive Officer while the 2nd Applicant succeeded. The respective positions on the issue of costs may be summarised as follows:

   (a) the Applicants contended no order should be made as to costs in relation to the 1st-2nd Respondents while those parties sought their costs;

   (b) the 3rd Respondent agreed there should be no order as to costs generally and opposed the 2nd Applicant's application for 50% of the costs attributable to this part of the case.

Overview of the case and the result

3. Although the application sought non-constitutional relief as well, the dominance of the constitutional issues raised is reflected in the opening words of the Judgment itself:

> "*1. The present application, despite its various narrower strands, raises one central legal question. Did the impugned statements made by the 1st Applicant, which were undoubtedly offensive to persons of European descent*

and homosexuals, arguably cross the boundaries of constitutionally protected free speech into the domain of legally unprotected 'hate speech'? It was common ground that the Bermudian Constitution protects freedom of expression sufficiently broadly to make it impermissible for the State to punish or sanction the expression of opinions which are merely controversial, offensive or even shocking."

4. In traditional terms it is obvious that the Respondents achieved substantial success in that they prevailed on 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. As regards the non-constitutional challenges to the stop list decision, the 1st-2nd Respondents fully prevailed. The challenge to the 3rd Respondent's decision to investigate was wholly unsuccessful. The challenge to the referral of the Complaint to the Tribunal as against the 2nd Applicant was only successful in part based on interventions from the Bench.

5. The 2nd Applicant can only have been motivated by a desire to express solidarity with the 1st Applicant (his former guest) when he elected not to advance a positive case that his position was legally different to that of the 1st Applicant. As admirable as his stance may be considered to be in moral terms, it undermined Mr. Tucker's ultimate costs position in legal terms. The 3rd Respondent was never put on notice that any distinct legal case was being advanced by the 2nd Applicant and given an opportunity to abandon that limb of her case. More importantly still, it is impossible to identify the expenditure of any additional costs in relation to the successful limb of the 2nd Applicant's case which would not have been expended on behalf of the 1st Applicant in any event.

Principles governing the award of costs in constitutional applications

6. In *Minister of Home Affairs and Attorney-General-v-Barbosa* [2017] CA (Bda) Civ (30 March, 2017), Sir Scott Baker (P) laid down guidance on the distinctive approach to awarding costs in constitutional cases. He approved the approach followed by Hellman J in *Holman* [2015] SC (Bda) 70 Civ (13 October 2015), based primarily on South African Constitutional Court authority, in particular *Biowatch Trust v Registrar: Genetic Resources and Others* [2009] ZACC 14 (Sachs J) and the Eastern Caribbean Court of Appeal decision in *Chief of Police et al v Calvin Nias* (2008) 73 WIR 201 (Rawlins CJ). In *Holman*, Hellman J (in a passage now approved by the Court of Appeal for Bermuda) concluded as follows:

"*16…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."

7. In *Barbosa*, Baker P. (delivering the judgment of the Court of Appeal for Bermuda) concluded as follows:

> "*10. 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 Caribbean Courts of Appeal has followed such a course. I would therefore respectfully adopt Hellman, J's above statement 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.*"

8. These governing principles may for present purposes be further distilled into the following propositions:

> (1) the starting assumption in a constitutional case is that an unsuccessful private applicant should not be required to pay the costs of the successful public respondent unless they have acted unreasonably in bringing the proceedings or have conducted the proceedings in an unreasonable manner;
>
> (2) the Court's overriding duty is to make an order which is just having regard to the facts of each case, taking into account matters such as partial success and the relevance of non-constitutional claims.

Findings: the appropriate costs order in the present case

9. In my judgment the appropriate award is for this Court to make no order as to costs. I base this on the following findings:

(a) the Applicants are private citizens who have been unsuccessful overall;

(b) the Applicants have neither acted unreasonably in bringing the present proceedings nor in the manner in which they have prosecuted them. The application has helped to develop entirely new Bermudian law in a field of public importance;

(c) the non-constitutional issues were of limited significance in costs terms and were not entirely discrete in any event (e.g. the interpretation of both section 31(5) of the Bermuda Immigration and Protection Act 1956 and section 8A(1) of the Human Rights Act 1981 was materially shaped by the constitutional arguments); and

(d) the partial success the 2nd Applicant achieved was of little or no significance in costs terms.

Dated this 2nd day of May, 2017 _____
IAN RC KAWALEY