



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019 No. 200

**BETWEEN:**

**TERRY LYNN THOMPSON**

Applicant

**And**

**THE PUBLIC SERVICE COMMISSION**

1<sup>st</sup> Respondent

**And**

**HIS EXCELLENCY THE GOVERNOR OF BERMUDA**

2<sup>nd</sup> Respondent

**And**

**THE ATTORNEY GENERAL**

3<sup>rd</sup> Respondent

## **RULING ON COSTS**

*Application for Judicial Review against Decision not to appoint Applicant as the Director of Parks- Construction of Section 82 of the Bermuda Constitution Order 1968 –Whether the decision of the PSC to abort the recruitment process was ultra vires and void - Public Service Commission Regulations 2001- Delegation of powers vested in H.E. The Governor of Bermuda to the Public Service Commission- Legitimate Expectation*

Dates of Hearing: 12 July 2023  
Date of Judgment: 08 August 2023

Counsel for the  
Applicant: Mr. Adam Richards  
(Marshall Diel & Meyers Limited)

Counsel for the  
Public Service Commission: Mr. Richard Horseman (Wakefield Quin Limited)

Counsel for H.E. The Governor  
and the Attorney General: Mr. Brian Myrie (Crown Counsel)

RULING of Shade Subair Williams J

### **Introduction:**

1. The parties in this matter are in dispute as to the appropriate award to be made on costs arising out of my judgment of 17 November 2021. That judgment was made in answer to an application for judicial review against the process employed in refusing to appoint the Applicant, Ms. Terry Lynn Thompson, to the post of Director of Parks for the Department of Parks under the Government Ministry of Public Works.
2. On 12 July 2023 Counsel appeared and made oral arguments before me, having filed written submissions. This is my Ruling as to costs.

### **Summary of the Arguments:**

3. Mr. Richards, on behalf of the Applicant, argued that costs should follow the event. His position was that the Applicant had overall success, when looking at the substantive judgment of this Court as a whole. As such, the Applicant is opposed to a partial costs award as proposed by my provisional Order granting 70%.
4. Counsel relied on RSC Order 62/3(3) which empowers the Court, in the exercise of its discretion, to make an order for costs to follow the event. Under that provision it states:

*“If the Court in the exercise of its discretion sees fit to make any order as to the 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.”*

5. Mr. Richards also pointed to the decision of the Honourable Chief Justice Mr. Kawaley (as he then was) in *Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs)* [2013] SC (Bda) 35 Civ (1 May 2013) [13]:

*“Mr. Pachai’s most ambitious submission was the contention that the Minister’s costs should be reduced to reflect the significant success the Applicant achieved in relation to its constitutional point. He faced two hurdles. Firstly, this Court’s jurisdiction to make issues-based costs orders finds no express support in the Rules unlike the position under the English CPR (paragraph 44.3(6)(f); the Court of Appeal for Bermuda has cautioned this Court against playing fast and loose, as it were, with the basic principle that costs follow the event and that success should be measured in practical terms.”*

6. Kawaley CJ was referring to Sir Anthony Evans JA’s judgment for the Court of Appeal in *First Atlantic Commerce v Bank of Bermuda Ltd* [2009] Bda LR. In that case, the Court of Appeal disapproved of the lower Court’s reduction of a costs award which had been made to reflect the recoverable loss as opposed to the decision on liability. Notwithstanding, citing *In re Elgindata Ltd (No.2)* [1992] 1 WLR 1207, Evans JA envisaged that the successful party’s costs could nevertheless be reduced under circumstances where superfluous issues were unnecessarily raised or where there was otherwise good reason to make such a reduction.
7. This Court was also referred to Kawaley CJ’s decision in *Binns v Burrows* [2012] SC (Bda) 3 Civ (12 January 2012) [6] where he summarised the position having considered *First Atlantic Commerce v Bank of Bermuda Ltd*:

*“...the Court’s duty in awarding costs will generally be to:*

- (a) determine which party has in common sense or “real life” terms succeeded;*
- (b) award the successful party its/his costs; and*
- (c) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.”*

8. The First Respondent, on the other hand, contended that Applicant did not secure overall success and pointed to various portions of my 2021 Judgment where I ruled in favour of the arguments made by the Respondents. One of the examples relied on was my refusal to award the Applicant damages. Mr. Horseman also pointed to this Court’s refusal to admonish the PSC’s acting appointment as either *ultra vires*, unlawful, void or ineffective. He further highlighted the Applicant’s failure to establish a legitimate expectation for appointment and her failure to persuade this Court on the legal merits of its application for an order of appointment to the post of Director.

9. It was common ground between the parties that the only successful ground advanced by the Applicant was in relation to my finding that the PSC acted unfairly in withdrawing its July 2018 offer for the Applicant to act as the Director without first informing her of the grounds on which it proposed to do so and without allowing her the opportunity to make representations on those grounds.

## **Analysis and Findings**

10. On my assessment of the position, I find that the Applicant had overall success on her application for judicial review of the process employed by the Public Service Commission. While she failed on several of the grounds argued, she was successful on one significant point which was enough to catapult her into the realm of victory.
11. Heeding to the Court of Appeal's caution against reducing costs awards, I am not inclined to make a partial costs award as to do so would be to engage in a flawed exercise of measuring the successful arguments as oppose to the successful overall result. The same approach would generally apply in appeal proceedings. Where an appeal is allowed on one ground out of several other unsuccessful grounds, the overall success of the Appellant is unmarred. The bottom line position would be that appeal was successful. Here, the position is the same. The Applicant was successful in that the procedure undertaken by the PSC was shown to have been wrong as a result of the Applicant's claim for judicial review. For these reasons, I find that the Applicant is entitled to a full award of costs against the First Respondent.
12. As for the Second and Third Respondents, the parties agreed that no costs order should be made in the circumstances of this case.

## **Conclusion**

13. I award the Applicant her costs against the First Respondent on a standard basis to be taxed by the Registrar if not agreed. No order as to costs is made against the Second and Third Respondents.

Tuesday 8 August 2023

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**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS  
PUISNE JUDGE OF THE SUPREME COURT**