The Court of Appeal for Bermuda

CIVIL APPEAL No. 3 & 3A of 2016

Between:

THE MINISTER OF HOME AFFAIRS

and

THE ATTORNEY GENERAL

Appellants

-v-

MICHAEL BARBOSA

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Mr Phil Perinchief, and Ms Wendy Greenidge, for the Attorney-General's Chambers, for the Appellants
Mr Peter Sanderson, Wakefield Quin Limited, for the Respondent

Date of Hearing: **8 March 2017**

Date of Judgment: **24 March 2017**

Orders for Costs in Constitutional Cases – Test to be applied.

JUDGMENT

Baker, P

1. The Respondent is entitled as of right to appeal to Her Majesty in Council under section 2(b) of the Appeals Act 1911. The Court is required to fix the amount of security not exceeding $12,000.00 and the period within which it is to be paid, not exceeding three months from 8 March 2017.

2. The amount of security and the appropriate order for costs both before us and in the Court below has been the subject of dispute between the parties. The underlying issue is the principle on which costs should be ordered in constitutional cases. In *The Attorney-General v Martin Holman Others* (Civil Appeal No. 23 of 2015) we declined to express an opinion without reference to the authorities and argument from both sides. In the present appeal we have had that opportunity.

3. The general rule in civil litigation is that costs follow the event, i.e. the loser pays the winner's costs. At least that is the starting point. In *Fay and Another v The Governor and the Bermuda Dental Board* [2006] Bda L.R. 72, Kawaley J, as he then was, referred to Order 62 Rule 3(3) and said:

> *"…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."*

4. *Fay* was a case that involved both a judicial review application and a constitutional application. As Kawaley J pointed out, the two were interrelated because section 15 of the Constitution requires an applicant for constitutional redress to exhaust other remedies before seeking redress under that section.

5. *Fay* was not a case about costs in constitutional cases simpliciter and nor does it appear that the judge was referred to a number of authorities dealing with costs in constitutional cases. At first instance in *Holman* [2015] SC

(Bda) 70 Civ (13 October 2015), Hellman J referred to a number of cases that had been decided by the Constitutional Court of South Africa. These were *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; *City Council of Pretoria v Walker* (1998) 4 BHRC 324; *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.

6. In *Biowatch* Sachs J, considered the authorities and outlined what he considered should be the correct approach.

> *"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.]

7. Hellman, J pointed out that a similar approach has been adopted by the East Caribbean Court of Appeal and referred to *Chief of Police et al v Calvin Nias* (2008) 73 WIR 201 where Rawlins CJ said at para 38:

"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.]*

8. Hellman, J then concluded at paragraph 16 that for the reasons explained by Sachs J in *Biowatch* the following principle was applicable in Bermuda:

> *"…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."*

9. Mr. Perinchief on behalf of the successful appellants argued strongly that there is no different rule in constitutional cases and that the ordinary rule as described in *Fay* applies. He submitted that it was wrong to deprive the Government of its costs when it had succeeded; that such a rule would encourage unnecessary litigation and upset the balance of risk. Further, in a case such as the present, the fruits of litigation remained on the tree of justice until final determination of the appeal and where an appeal is successful it should not to be regarded as depriving the private litigant of the fruits of their litigation.

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.

11. I turn therefore to the appropriate order in the present case. The issue on which the Respondent succeeded in the Court below and lost in the Court of Appeal, namely belonging to Bermuda, was not the only one before the Court, albeit the most significant one. There were other issues not pursued by the Appellants on the appeal. I would make no order as to costs both before Hellman, J and in the Court of Appeal. I consider that a more than nominal sum is required by way of security which I would fix at $4,000.00, payable within three months.

Signed

Baker, P

Signed

Bell, JA

Signed

Clarke, JA