[2014] JMFC Full 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 05676 of 2012

No 2 (COSTS)

THE HONOURABLE MISS JUSTICE PAULETTE WILLIAMS

THE HONOURABLE MR JUSTICE SYKES

THE HONOURABLE MR JUSTICE PUSEY

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON,** alleging a breach of his rights under 13 (3) (c) & (d) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON** for

constitutional redress pursuant to Section 19 of the said Charter

BETWEEN	**MAURICE ARNOLD TOMLINSON**	**CLAIMANT**
AND	**TELEVISION JAMAICA LTD**	**FIRST DEFENDANT**
AND	**CVM TELEVISION LTD**	**SECOND DEFENDANT**
AND	**PUBLIC BROADCASTING CORPORATION OF JAMAICA**	**THIRD DEFENDANT**

IN OPEN COURT

Lord Anthony Gifford QC and Anika Gray instructed by Anika Gray for the claimant

Georgia Gibson-Henlin and Taniesha Rowe instructed by Henlin Gibson Henlin for the first defendant

Hugh Small QC, Jerome Spencer and Hadrian Christie instructed by Patterson Mair Hamilton for the second defendant

Donald Scharschmidt QC, Saverna Chambers and Jebby Campbell instructed by Saverna Chambers and Co for the third defendant

November 15, 2013 and March 17, 2014

COSTS – WHETHER COST SHOULD BE AWARDED – RULE 56 AND 64 OF THE CIVIL PROCEDURE RULES

PUSEY J

[1] This is the unanimous judgment of the court to which we have all contributed. When this Court handed down its decision on November 15th 2013, we invited the parties to make submissions on the issue of costs. We did this as this case was the first to determine that the Bill of Rights had horizontal application between citizens and was not only enforceable between individuals and the state. Consequently it fell to be decided whether costs were applicable on a party and party basis between private individuals.

[2] This is a new area and as such we felt desirable to put our reasons in writing. As we enter this new dispensation where private individuals may be brought before the Court for having breached the constitutional rights of another individual, the Courts must consider whether the successful party should be reimbursed for the considerable costs of litigating a matter in the Constitutional Court.

[3] We were referred to a number of cases particularly from the Constitutional Court of the Republic of South Africa. These cases have proved very helpful for a number of reasons. First, South Africa has a constitution which permits one citizen to bring a constitutional action against another citizen. This is now called horizontal application. Second, the Constitutional Court has had to address the issue of costs in varied factual circumstances in the context of horizontal application. Third, a number of principles seem to be emerging which are of importance.

[4] The relevant rules of theCivil Procedure Rules ('CPR') are rules 56.15 (4) and (5). They read as follows:

> *(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*
>
> *(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.*

[5] These costs rules apply to constitutional claims as well as to judicial review proceedings. This is so because rule 56.1 states that Part 56 applies to judicial review and constitutional actions. Part 56.1 reads:

> *This Part deals with applications -*
> *(a) …*
> *(b) by way of originating motion or otherwise for relief under the Constitution;*

[6] When these rules came into effect in 2002 constitutional actions against private citizens by private citizens were not common. Indeed, before the new Charter of Fundamental Rights and Freedom came into effect in 2011, the legal position was not very clear as to whether horizontal application of the then bill of rights provisions was permissible (**Grant v Director of Public Prosecutions** (1979) 29 WIR 235, 243 – 244 (Smith CJ) cf White J 278, Campbell J 297 - 298; (1980) WIR 246, 272 - 273 (Carberry JA)). The CPR came into effect in this state of uncertainty and perhaps it is fair to say that the framers of the rule did not have horizontal application in mind.

[7] However, that does not necessarily mean that the present state of the CPR cannot apply to the new position whereby one private citizen can enforce the bill of rights against another private citizen. The reason for this position is the principle called the always-speaking principle. What this means is that statute or rules when promulgated are always speaking once they have not been repealed and it is a matter of interpretation whether the words used apply to the new situation. For example, in **R v Ireland** [1998] AC 147, the issue was whether a particular psychiatric illness fell within the definition of 'bodily harm' in the 1861 Offences Against the Person Act. The House of Lords held that it did, despite the fact that the illness in view was not known in 1861. Similarly in **Regina v Secretary of State for Health** [2003] 2 AC 687 the question was whether a 1990 statute could be extended to protect embryos developed by a method which did not exist at the time the statute was passed. The House of Lords held that it did. The point then is that the claimant's submissions have the support, in principle, of high authority and ought not to be dismissed out of hand.

[8] The second defendant's attorneys took on the challenge of arguing the case for the award of costs. They started by seeking support from the CPR. CPR 64.6 (1) sets out the general civil law principles governing the award of costs. It refers to "*the general rule*" that an unsuccessful party should pay the costs of a successful party. The section also provides that a successful party may pay part of the costs of an unsuccessful party or the Court may make no order as to costs. In making a decision as to the payment of costs the court must have regard to the parties success on particular issues and their conduct before and during the proceedings. Additionally, the Court must consider the reasonableness and manner in which the party raised or pursued particular issues. These positions include:-

a. the claimants right to bring an action;

b. the Charter of rights allows one private citizen to bring an action against another private citizen; and

c. the second defendant's right to freedom of expression includes a right not to carry the claimant's advertisement; and

d. the editorial control available to broadcasters generally and CVM in particular.

[9] The second defendant submitted that rule 56.15(5) does not apply to constitutional litigation between private parties. This submission is made on the ground that the Charter took effect after the CPR was drafted and therefore the horizontal application of constitutional rights was not in the contemplation of the Rules Committee at the time that the CPR was drafted. The second defendant further submitted that in light of the manner in which they conducted the matter and the overall outcome, the court should exercise its discretion under Part 64 and award costs in its favour. It further submitted that even if rule 56.15(5) applies to the current situation, the claimant acted unreasonably in bringing in the claim because save for a determination of whether a private citizen could contravene the constitutional rights of another, the claim failed. It therefore contends that by virtue of the foregoing, it is entitled to the costs of two attorneys.

[10] Mr. Small QC and Mr. Spencer for the second defendant pointed out that the orders sought by the claimant would have had substantial financial consequences for the second defendant. The claimant failed to establish that his constitutional rights were contravened and the evidence indicated that the second defendant had permitted the claimant and others to articulate the issues espoused by him. CVM attempts to avoid the obstacle posed by CPR rule 56.15 (5) by stating that the claimant has acted unreasonably and therefore the order for costs should be made against him. The second defendant pointed out that it was a successful party and resisted all the relief sought by the claimant. It also held and argued positions that the Court adopted.

[11] The first defendant submitted that the Court should be guided by Part 64 of CPR, which provides that costs are in the discretion of the Court and is generally awarded to the successful party. It further submitted that the approach that has been adopted by the South African Courts when considering the issue of costs in the context of the horizontal application of constitutional rights is to award costs to the respondent if the applicant is unsuccessful.It is the first defendant's submission that as it was not at fault and was forced to assert its rights in the interest of its commercial enterprise, it is only just and equitable that it should be awarded costs. The first defendant seeks an award of costs by way of a Special Costs Certificate and costs for two counsel on the grounds that the matter was a complex one which involved novel points of law in uncharted waters.CVM argues that based on their success in the case and the reasonable positions they held costs ought to be awarded in their favour.

[12] The third defendant made no submissions on costs. No reasons were given but quite likely counsel was influenced by the fact that in this jurisdiction it is not the practice to award costs to state agencies except in exceptional circumstances (**Walker v Contractor General** (Costs) 2013] JMFC FULL 1(A)).

[13] In response to the second defendant's submission that there was no intention for rule 56.15 (5) to apply to private defendants, the claimant submitted that had there been an intention to depart from CPR 56.15 (5) in cases involving private litigants, the CPR would have been amended at the time the Charter was amended. In response to the South African precedent cited by the defendants in support of their submissions that costs should be awarded where the applicant makes an unsuccessful claim against a private party, the claimant relied on several South African cases that demonstrate that the approach of the Court has been to make no awards of costs against the applicant where the issues brought before the Court have a broader public interest dimension and where the applicant acts reasonably.

[14] The claimant's view on Part 56 has the support of the Court of Appeal of Jamaica where that court held in ***Golding v Simpson Miller*** SCCA 3/08 (unreported) (decided April 11, 2008) that when dealing with judicial review proceedings, Part 56 is the only applicable rule unless Part 56 makes specific reference to some other rule in the CPR. We submit that the same applies for all proceedings covered under the scope of Part 56. Therefore, when dealing with constitutional claims, the Court should be guided by Part 56. Add to this the definition of civil proceedings in rule 2.2 (1) of the CPR which is that civil proceedings include judicial review and applications to the court under the Constitution under Part 56. The consequence of this being that constitutional actions necessarily are civil proceedings and therefore fall within the self-contained part of the CPR. We now turn to the cases from South Africa.

The South African cases

[15] It appears that in South Africa there is no equivalent of Parts 56 or 64 in the procedural rules. We say this because no judge in any of the cases has referred to any such rule. We note and appreciate that this is an argument from silence but we take the view that it is almost inconceivable that such a rule could exist and not a single judge in a period going ten years or more has mentioned it even in cases where the sole issue was costs.

[16] We have observed that in South Africa despite the apparent absence of costs rules, the Constitutional Court has fashioned principles applicable to constitutional litigation between citizen and state (vertical application) and citizen and citizen (horizontal application). In **Affordable Medicines Trust v Minister of Health** [2005] ZACC 3, 2005 (6) BCLR 529 the principle laid down there was that if the government won then each party bears its own costs and if the government lost then it pays the costs of the citizen.

[17] The rationale for this position was stated in ***Biowatch v Registrar Genetic Resources*** [2009] 5 LRC 445; [2009] ZACC 14 at paragraphs 23 and 24 by Sachs J:

> *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. (We do not need to deal here with the legislation enacted prior to 1994.) 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.

[18] In response to the issue of whether costs awards in constitutional litigation should be determined by the status of the parties or by the issues, Sachs J stated that it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. He asserted 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.

[19] To guard against dressing up frivolous cases as constitutional ones in order to escape costs, Sachs J noted that merely labelling litigation as constitutional and dragging in specious reference to the Constitution would not be enough to afford an exception to the general costs rules as the issue must be genuine and substantive and truly raise constitutional considerations relevant to the adjudication and in such cases the applicant could not expect to be immunised against an adverse costs award.

[20] Sachs J conducted an analysis of the constitutional cases that preceded **Biowatch** and pointed out that while there had been several cases involving litigation between private parties on constitutional matters where the court had ordered that costs should follow the result, usually those matters turned on the relationship between competing constitutional principles. The examples he gave, also happen to be the cases that have been relied on by the defendants: **Khumalo v Holomisa** [2003] 2 LRC 382 (defamation), **Laugh It Off Promotions**

CC v South African Breweries International (Finance) BV t/a Sabmark International [2005] 5 LRC 475; [2005] ZACC 7, (trademark property protection versus freedom of speech) and **NM v Smith** , [2007] 4 LRC 638; [2007] ZACC 6 (privacy versus freedom of speech--costs allowed subject to tender made in High Court).

[21] In ***Barkhuizen v Napier*** (2007) 22 BHRC 717; [2007] ZACC 5 at paragraph 90, Ngcobo J, writing for the majority which overturned a costs order made against the unsuccessful applicant in a constitutional action, pointed out that-

> *This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order for costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and in the courts below.*

[22] In this case we see that one important consideration in ordering costs in party and party constitutional litigation is whether important constitutional issues were raised.

[23] Despite the apparent clear statement of principle in **Biowatch**, the issue of costs in constitutional cases between private citizens remains a vexed one. As recently as 2010 the South African Constitutional Court has had to address the issue yet again. In ***Bothma v Els,*** [2010] 1 LRC 410 the court reiterated its

stance that the general principle in private constitutional litigation is that the losing party should pay the costs of the winning party. However, the court did go on to note that even in private constitutional litigation the chilling adverse effect costs orders may have and the broader implications of most constitutional litigation may prove very important in deciding whether costs should be awarded. Sachs J pointed out that the rationale for costs awards in vertical constitutional litigation may apply to horizontal constitutional litigation.

Application

[24] The South African cases have highlighted principle in private constitutional litigation which may prove significant in justifying a departure from their rule which is that the winning private party should have his costs paid unless there is something exceptional to justify a departure from that rule. The court has also stated what its position is regarding vertical constitutional litigation. It would seem to us that those considerations identified by the South African Constitutional Court in both horizontal and vertical constitutional actions can be used to assist in deciding whether any litigant acted unreasonably so as to justify a departure from the general rule in Jamaica identified in Part 56.

[25] In our view:

a. costs can be awarded in horizontal litigation of constitutional matters; and

b. Part 56.15 of the CPR does not preclude an award of costs.

[26] In considering whether there should be an award of costs in this case we considered the following:

a. whether the claim was frivolous and had little chance of success;

b. the importance of the issues raised on the constitutional action;

c. whether the issues raised have been dealt with by judicial decisions in from the Supreme Court or Court of Appeal or the Judicial Committee of the Privy Council on appeal from Jamaica;

d. whether new principles were established;

e. the chilling effect of a costs order;

f. whether the claimant has been successful on any issue in the case; and

g. in constitutional matters a very important consideration is whether the losing party contributed significantly in establishing any new principle or contributed significantly to clarifying any existing principle.

[27] In general terms we have concluded that cost awards in these matters will be governed by the overarching principle of not discouraging the pursuit of constitutional claims, irrespective of the number of private parties seeking to support or oppose the state's posture in the litigation.

[28] This is the first case under the new Charter in which the enforcement of the bill of rights was attempted in horizontal litigation. The claimant established that horizontal application of the bill of rights is part of Jamaican constitutional law.

[29] Regarding the specific issue in the claim, the industriousness of counsel and the bench did not uncover any previous case in which the precise issue was dealt with. The resolution of the claim depended on examination of authorities from the United States of America, Canada, the Republic of South Africa, the Democratic Socialist Republic of Sri Lanka, the Judicial Committee of the Privy Council and the European Court of Human Rights. This extensive canvassing of cases suggests that the matters raised were of great complexity and required

deep reflection before a decision was delivered. There is no doubt that a significant step has been taken in Jamaican constitutional law by this decision.

[30] It could not be said that the claim is frivolous and had little chance of success even though the claimant lost on all the major issues except that of standing to bring the claim.

[31] From what has been said we have concluded that the claimant has not acted unreasonably. Part 56 applies to this claim and is speaking.

[32] It is our view that this case raised important issues of law and how the constitutional law relates to individuals. The Court has been given the landmark opportunity to consider horizontal application under the Charter of Rights.

[33] There will be no order as to costs.