

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. 115 of 2011**

**Between**

**DEVANT MAHARAJ**

**Appellant**

**And**

**NATIONAL ENERGY CORPORATION OF TRINIDAD AND TOBAGO**

**Respondent**

**PANEL: P. JAMADAR, J.A.  
N. BEREAX, J.A  
G. SMITH, J.A.**

**APPEARANCES: A. Ramlogan SC and G. Ramdeen for the appellant  
E. Prescott SC and K. Alexander for the respondent**

**DATE DELIVERED: 31<sup>st</sup> October 2017**

**RULING**

## **Introduction**

[1] On 26<sup>th</sup> April 2017, we dismissed this appeal (Jamadar JA dissenting). We reserved our decision on costs pending written submissions from the parties. Having read their respective submissions we find that the respondent is entitled to its costs.

[2] The appeal arose out of a claim for judicial review under the Freedom of Information Act. The parties agreed to be bound by the decision in a related matter, subject only to the issue of delay, which was expressly reserved for argument by the respondent. The related matter was resolved in favour of the appellant who was granted disclosure of the information sought in that application. The parties then argued the issue of delay before Boodoosingh J who upheld the respondent's objection. In dismissing the appeal, the majority disapproved the decision of the Court of Appeal in **Abzal Mohammed v. Police Service Commission, Civil Appeal No. 53 of 2009** on the issue of delay and refused to follow it.

## **Relevant history**

[3] This history of the relevant events is taken from the court's records which differ in some respects from the facts set out in the submissions of both parties. On 4<sup>th</sup> June 2014, the appellant was ordered by the Court of Appeal to pay the respondent's costs of the day, agreed in the sum of ten thousand dollars (\$10,000.00). His non-compliance with the court's directive to file written submissions resulted in the appeal being adjourned and he was punished in costs. On 13<sup>th</sup> July 2015, Yorke-Soo Hon JA fixed a costs budget for the appeal in the sum of one hundred and ninety thousand dollars (\$190,000.00). She ordered that the appellant pay the respondent's costs of that application for a costs budget to be assessed by the Registrar. The respondent claims the sum of four thousand dollars (\$4,000.00). We consider that to be a reasonable sum and shall make that order now.

### **Submissions of the appellant**

[4] Mr. Ramlogan submitted that each party in this appeal should bear its own costs on the following grounds:

- a. That the appeal was filed based on the public interest as a fact finding mission;
- b. That the respondent admitted that there was no prejudice;
- c. That the pursuit of the appeal was reasonable given the law as then stated in **Abzal Mohammed v. Police Service Commission**;
- d. That in disapproving the decision in **Abzal Mohammed**, the Court of Appeal resolved an important issue of public law;
- e. That the change in the law was not prompted by the submissions made by the respondent but by the Court of Appeal *ex proprio motu*;
- f. That the resources of the respondent are vast in comparison to the appellant who acted reasonably in raising the issue; and
- g. That the decision to appeal was reasonable because the authorities considered by the Court of Appeal were not considered by the trial judge, on account of the fact that he did not cite any case law in his reasoning.

### **Submissions of the respondent**

[5] Citing the general rule in Part 66.6(1) of the Civil Proceedings Rules 1998 as amended (CPR), Mr. Prescott submitted that the respondent was entitled to the costs of the appeal because the Court of Appeal, albeit by a majority, had decided the appeal in its favour. He referred to the factors listed in Part 66.6(5) of the CPR, submitting that the court should also have regard to the fact that the respondent had:

- conducted itself in these proceedings in a manner that was above reproach as it had not wasted judicial time.
- complied with the court's directions.
- addressed issues without any delay and
- sought at all material times to assist the Court.

He added that the appellant had not established any authority which indicated that the grounds they had listed were relevant in determining whether to make an award as to costs.

## **Conclusion**

### *Entitlement to costs*

[6] Part 66.6(1) of the CPR directs that *“If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.”* Subparagraph (2) thereafter gives the court the discretion to order a successful party to pay all or part of the costs of an unsuccessful party. Part 66.6(3) empowers the court to order the payment of only a specified proportion of another person’s costs (Part 66.6(3)(a)) or the payment of costs from or up to a certain date only (Part 66.6(3)(b)) or the payment of costs relating only to a specified part of the proceedings (Part 66.6(3) (c)).

[7] Part 66.6(4) mandates the court, in deciding on the payment of costs, to have regard to all of the circumstances. Part 66.6(5) sets out the factors to which the court must have particular regard. These are:

- a. the conduct of the parties;
- b. whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;
- c. whether it was reasonable for a party –
  - (i) to pursue a particular allegation; and/or
  - (ii) to raise a particular issue;
- d. the manner in which a party has pursued –
  - (i) his case;
  - (ii) a particular allegation; or
  - (iii) a particular issue;
- e. whether a claimant who has won his claim caused the proceedings to be

- defended by claiming an unreasonable sum; and
- f. whether the claimant gave reasonable notice of his intention to issue a claim.

Part 66.6(6) provides that the conduct of the parties includes:

*“(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol; and*

*(b) whether either or both parties refuse unreasonably to try an alternative dispute resolution procedure.*

*(Rule 67.11 sets out the way in which the court must deal with the costs of procedural hearings other than a case management conference or pre-trial review).”*

[8] The factors set out in Part 66.6(5) can be taken together or individually in deciding whether to apply or depart from the general rule. They can be used in derogation from or in application of the general rule, whether taken together or individually. For example, there may be aspects of the conduct of the succeeding party in pursuing the litigation, which were so unreasonable as to be sufficient, by themselves, to permit the court to order that that party pay all or part of the losing party's costs. By way of further example, it may be that the losing party's pursuit of litigation may have been wholly reasonable and necessary or that the losing party may have succeeded on a majority of issues in the litigation; in such cases the losing party may be ordered to pay none of or only a part of the costs of the litigation. On the other hand, the successful party's pursuit or defence of litigation may have been entirely reasonable and the general rule would be applied. In every case the issue will be whether the general rule would be applied so as to entitle the successful party to the costs of the litigation or whether the Part 66.6(5) factors taken separately or together were cogent enough to detract from the general rule.

[9] Mr. Ramlogan's submissions are summarised at paragraph [4]. In so far

as he contends that it was reasonable to pursue the appeal given the state of the law as set out in **Abzal Mohammed**, I agree. But that does not disentitle the respondent to its costs. The respondent's objection was well founded and it succeeded. There can be no criticism of its conduct of these proceedings. Indeed none of the appellant's submissions is sufficient to detract from the general rule. For the most part they do not fall within the particular factors which the court is mandated to consider. The respondent had always maintained from the beginning that the appellant was not prompt in the filing of the application. It has expended time and money defending the action. Further, as Mr. Prescott submitted, the appellant is not beyond reproach. It was his lack of promptitude which brought about the respondent's objection.

*Assessment of costs*

[10] Mr. Ramlogan appeared to submit that budgeted costs do not apply to the assessment of costs in respect of applications for administrative orders under Part 56. He relied on the dictum of Mendonça JA in **Nizam Mohammed v. The Attorney General of Trinidad and Tobago, Civil Appeal No. 75 of 2013**. That was a decision in which the Court of Appeal (Mendonça, Jamadar and Bereaux, JJA) held that costs in respect of administrative orders are not to be assessed on the prescribed scale under Parts 67.5, 67.6 and 67.7 but should be assessed by the trial judge under Part 67.12 pursuant to Part 56.14 (5). In the course of his judgment however Mendonça JA stated at paragraph 16:

*“16. With respect to whether budgeted costs apply, it does not seem to me to necessarily follow that because 56.14 provides for the assessment of costs under 67.12 that the Court cannot set a costs budget, which in itself may involve an assessment of costs. However whether or not budgeted costs are available in applications for administrative orders would depend on a proper interpretation of the CPR. As I mentioned earlier that was not an issue before us and we have heard no submissions on that issue. I therefore do not wish to express any concluded view on the*

**question. I am however left in no doubt that whether or not budgeted costs are available this does not affect the interpretation of 56.14(5) which requires costs to be assessed under 67.12 and not calculated on the prescribed costs scale.” (emphasis added)**

[11] Mr. Ramlogan sought to rely on this dictum as suggesting that budgeted costs may not apply to applications for administrative orders under Part 56.14. I do not agree. Indeed Mendonça JA clearly recognises that budgeted costs may well apply to judicial review proceedings, even though Part 56.14 provides for assessment of costs under Part 67.12. But the judge himself noted that the issue was not then before the Court of Appeal. Further, the **Nizam Mohammed** appeal was from a decision of the High Court in judicial review proceedings, in which the judge wrongly ordered that the High Court costs should be assessed on the prescribed scale. As Mr. Prescott in his very helpful submissions noted, the trial judge in this case made no order as to costs and there was no appeal from that decision. We are concerned only with appellate costs. This court thus only has to determine the costs in this appeal. Part 67.14 of the CPR directly applies:

***“Unless the Court of Appeal on an application made in accordance with rules 67.8 and 67.9 makes an order for budgeted costs, the costs of any appeal must be determined in accordance with rules 67.5, 67.6 and 67.7 and Appendix B but the costs must be determined at two thirds of the amount that would otherwise be allowed under Appendix B.”***

[12] There was a budgeted costs order made by Yorke-Soo Hon JA on 13 July 2015. Therefore pursuant to Part 67.14 those are the costs which are applicable in this appeal.

[13] Mr. Ramlogan also sought to rely on the decision of the Court of Appeal in **Civil Appeal No. S49 of 2013, Chief Fire Officer v. Felix-Phillip**, at paragraph 6, in which **Nizam Mohammed** is cited as authority for the proposition that judicial review proceedings are to be assessed in accordance with Rule 67.2

and 67.12. But there was, in **Felix**, no in-depth discussion of the specific application of Part 67.14 which makes a clear exception for budgeted costs to apply when so ordered by the Court of Appeal.

[14] Accordingly I shall order as follows:

- (i) The appellant do pay to the respondent costs in the sum of \$204,000.00 comprised as follows:
  - a. Agreed costs of the day of 4<sup>th</sup> June 2014 in the sum of \$10,000.00;
  - b. Costs of the budgeted costs application per order of Yorke-Soo Hon JA of 13<sup>th</sup> July 2015, assessed herein in the sum of \$4,000.00 and
  - c. Budgeted costs, ordered on 13<sup>th</sup> July 2015 in the sum of \$190,000.00.

Nolan P.G. Breaux  
Justice of Appeal

G. Smith  
Justice of Appeal