REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S 49 of 2013
H.C.C. No. CV2011-04887

BETWEEN

THE CHIEF FIRE OFFICER

First Appellant/Respondent

PUBLIC SERVICE COMMISSION

Second Appellant/Respondent

AND

ELIZABETH FELIX-PHILLIP
AND 37 OTHERS

Respondents/Applicants

PANEL: **A. MENDONÇA, J.A.**
P. JAMADAR, J.A.
N. BEREAUX, J.A.

APPEARANCES: **R. Martineau S.C. and S. Julien for the appellants**
R. Maharaj S.C. and V. Maharaj for the respondents

DATE DELIVERED: 14 April 2014

RULING

Delivered by Bereaux, J.A.

[1] On 7th October 2013, this Court discharged an interim injunction granted by the trial judge on 25th February 2013. By that injunction, the appellants/respondents were enjoined from filling any vacant substantive offices in which the respondents/applicants were acting, or to which they were eligible to be promoted, pending the hearing and determination of the application for judicial review (then proceeding before the judge).

The judge in granting the interim injunction reserved her decision on the issue of the costs of the application.

The order

[2] Having discharged the interim injunction we invited written submissions on the issue of costs and reserved our decision to a date to be fixed. The respondents/applicants filed their written submissions on 1st November 2013 and the appellants/respondents filed their submissions on the 5th November 2013. We have considered these submissions. Our decision on costs next follows, starting with our formal order. Brief reasons for our decision are thereafter set out. We order that:

(a) The respondents/applicants shall pay the appellants/respondents' costs of this appeal certified fit for one senior and one junior advocate attorney.

(b) Unless otherwise agreed between the parties, the costs of this appeal are determined at two thirds of the appellants/respondents' assessed costs of the application for an interim injunction before the trial judge.

(c) The costs of the application for the interim injunction before the trial judge shall be the appellants/respondents' costs in the cause.

(d) For the purposes of determining the quantum of costs of this appeal, the matter is remitted to the trial judge who is directed to assess the costs of the application for the interim injunction.

The costs award

[3] We have considered the factors to be taken into account in deciding the question of costs, as are set out in rule 66.6(5) of the **Civil Proceedings Rules 1998**. We were very helpfully referred to several useful authorities by both sides.

The decisions in **R (John Smeaton on behalf of Society for the Protection of Unborn Children) v. The Secretary of State for Health [2002] EWHC 886** at paragraphs 12 to 17 and **Flemming v. Chief Constable of Sussex [2004] EWCA Civ 643** at paragraphs 39 to 43, were particularly helpful. We saw no reason to depart from the general rule that the unsuccessful party to an application must pay the costs of the successful party. Even though the appellants/respondents did not succeed on the issue of delay it was not a significant part of the issues engaged in this appeal neither did it occupy any significant part of the judgment of this Court. There was no necessity to make a percentage deduction. The appellants/respondents have essentially succeeded on the main points raised in the notice of appeal.

[4] We also considered that the complexity of the arguments which involved consideration of the **American Cyanamid principles** and their application to public law cases, justified the instructing of two counsel to appear both in the High Court and the Court of Appeal. See **Peter Seepersad v. Theophilus Persad and Capital Insurance Limited [2004] UKPC 19** at paragraph 26.

The measure of costs

[5] As to the measure of costs, rule 67.14 of the **Civil Proceedings Rules 1998** provides that, unless the Court of Appeal orders budgeted costs, the costs of *any* appeal must be determined in accordance with rules 67.5, 67.6 and 67.7 and Appendix B of the **Civil Proceedings Rules 1998** but that such costs must be determined at two thirds of the amount that would ordinarily be allowed under Appendix B. On the face of it, this rule appears to ordain that the costs of all appeals be assessed on the prescribed costs scale, with the final award being two thirds of what could ordinarily be awarded under appendix B.

[6] However, in **Mohammed v. The Attorney General of Trinidad and Tobago, Civil Appeal No. 75 of 2013**, this court (Mendonça, Jamadar and Bereaux, JJA) held that judicial review proceedings are to be assessed in

accordance with rules 67.2 and 67.12.

[7] The issue in that case was whether a successful applicant in a claim for constitutional relief (being one of the class of applications for administrative orders within the meaning of Part 56) was entitled to costs assessed under rule 67.12 or determined on the prescribed scale per rule 67.5. Part 56.14(4) provided that a judge in granting relief may *"make such orders as to costs as appear to him to be just..."*. Rule 56.14(5) provided that the judge where he made *"any order as to costs he must assess them".*

[8] Jamadar JA noted that such proceedings (including constitutional proceedings) are unique because, inter alia, it is virtually impossible to apply standardised criteria based on the 'value' of the claim. As he noted at paragraph 34:

> ***"What 'value' does one place on the review or restraint of executive or administrative action by the State. Fixed or prescribed costs are simply not apt ... The very nature of these kinds of actions, which can include significant public interest litigation … justly demand case by case customised costs assessments."***

At paragraph 37 he added:

> ***"The specific intention that in administrative law claims the judge hearing and determining the matter must decide whether to award costs, what costs orders to make and to assess these costs based on the reasonable and fair value of work done in each particular matter, flows from the recognition that these types of action are unique - sui generis. This is the broad context in which sub-rules 56.14(4) and (5) must be considered."***

[9] Mendonça JA in his concurring judgment agreed at paragraph 14 *"that the*

intention is to treat applications for administrative orders as sui generis or in a class of its own. Prescribed costs are not appropriate to such claims". Pursuant to rule 67.12, the Court then directed that the costs be assessed by the trial judge and ordered that the costs of the appeal be assessed at two thirds of those assessed costs. We have followed that decision in this case and have made the same order for the same reasons. The costs must be assessed by the trial judge and thereafter the respondents/applicants shall pay to the appellants/respondents, two thirds of those costs, being the costs of this appeal.

[10] It is for this reason that we have directed at paragraph 2(d) that the judge assess the costs of the application before her. The respondents/applicants shall then pay two thirds of those costs to the appellants/respondents as the costs of this appeal. The full assessed costs of the application before the trial judge, being the appellants/respondents' costs in the cause, fall to be paid only if the appellants/respondents succeed in the substantive application for judicial review.

Costs below- appellants/respondents costs in the cause

[11] This being an injunction appeal, the decision of this Court in **Jetpak Services v. BWIA International Airways [1998] 55 WIR 362** is apt. de la Bastide CJ giving the decision of the Court stated at page 372 g:

> ***"… on the question of costs, the judge (although he discharged the injunction) ordered the costs of the application before him to be costs in the cause. The respondent contended before us that he should have ordered those costs to be paid by the appellant. In the light of our decision this is not a live issue. Nevertheless, while recognising that the High Court judge has a very wide discretion with regard to costs, I am of the view that when an application for an interlocutory injunction is refused, the normal order should be, as it is in England, that the costs of the application are the defendant's costs in the cause. This means***

that the plaintiff will not recover them even if he succeeds at the trial, whereas the defendant will, provided that he succeeds at the trial. I put this forward as a guide, and not to fetter the judge's discretion."

[12] That decision pre-dated the change to the **Civil Proceedings Rules 1998** (introduced in 2005) but the practice in Trinidad and Tobago as it relates to the award of costs in matters for injunctive relief has remained unchanged. We agree with the counsel of de la Bastide CJ that this approach should be taken as a guide and should not fetter a judge's decision but we consider that, in all the circumstances of this case, the same order is appropriate here. The judge made no decision on costs having reserved her decision but she should have dismissed the application and ordered (as we do now) that the costs of the application for the interim injunction, be the appellants/respondents' costs in the cause.

A. Mendonça
Justice of Appeal

P. Jamadar
Justice of Appeal

Nolan P.G. Bereaux
Justice of Appeal