COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
JUDICIAL REVIEW
Case # - 00025/2010

In The Matter of Order 53, Rule 3 of the Supreme Court Act, (1978);
And In The Matter of Articles 28 and 117 of the Constitution of The Bahamas;
And In The Matter of an application for redress pursuant to Art. 28 Of the Constitution;
And In the Matter of an application for judicial review by Cheryl Grant-Bethel.

BETWEEN

CHERYL GRANT BETHELL

Applicant

AND

SIR MICHAEL BARNETT (CHAIRMAN)
SENIOR JUSTICE ANITA ALLEN
TERRY GAPE
MICHAEL DEAN
HUGH SANDS
(Sued in their capacity as Chairman and Members comprising the Judicial and Legal Services Commission)

First Respondent

AND

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
(in a representative capacity)

Second Respondent

AND

JOHN K.F. DELANEY, ESQ., QC
(in his personal capacity)

Third Respondent

Appearances: Mr. Wayne Munroe and Mr. Maurice Glinton for the Applicant.
Messrs. Thomas and Milton Evans and Mrs. for the First Respondent.
Messrs.. Brian Simms and Turnquest for the Third Respondent.

Hearing dates: 12th August, 8th October, 2nd and 10th December 2010; 4th 5th and 6TH January 2011; 17th ,18th, 19th , 20th January 2011 and 16th February 2011.

RULING

Isaacs Sr.J:

1. On 18 March 2011 I heard the submissions of Counsel on the matter of costs arising out of my decision of 4 March 2011, namely whether costs should be awarded; and to whom. I promised then to put my decision in writing; and I do so now.

2. The Applicant, Mrs. Cheryl Grant-Bethell, had brought a judicial review application against the Judicial and Legal Services Commission ***("the JLSC"),*** the Attorney-General ***("the AG")*** and John K.F. Delaney ***("JD").*** The matter was heard before me in January and February 2011 but had commenced in August 2010.

3. On an application by JD and the AG that they were in effect improperly joined as parties in this action, the proceedings against JD were severed in January 2011 and directed to be continued by Writ. I ordered that he receive his costs on that application in any event. However, I did not accede to the application of the AG because I held that he was a proper party in this case due to the constitutional relief being sought by the Applicant. Thus, costs to be awarded in the case do not include JD.

4. Section 30 of the Supreme Court Act speaks to the award of costs. It provides, inter alia:

> "30. *(1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."*

5. Rules of Court have been promulgated and are to be found in the Rules of the Supreme Court. O 59 provides in part at rule 3:

> *"3. (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceeding except under an order of the Court.*
>
> *(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, 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."*

6. I believe it is accepted by all of the parties that the Court is entitled to make an award of costs to any party to the proceedings; and such an award lies

entirely within the Court's discretion. Nevertheless, the discretion is as Mr. Evans submits, to be exercised judicially. I understand that to mean the decision to make an award cannot be taken capriciously; and the Court ought to have regard to principles enunciated through the years by courts on various issues related to costs.

7. In Ewing v Times Newspaper Ltd. [2008] CSOH 169 Lord Brodie would have observed at paragraph 21, inter alia:

> ***"Litigation is a costly business; costly in time, trouble, anxiety and money for the litigants and costly in resources for the court. The power of the court to award judicial expenses payable by one party to another to some extent ameliorates the adverse consequences of this by allocating some of the purely financial cost to the party who has occasioned it by raising or defending an action on a basis which is found to be unjustified or initiating a procedural step unnecessarily or unsuccessfully. I say "to some extent" because party and party judicial expenses are usually less than the expense actually incurred in the litigation and time, trouble and anxiety are not compensated at all. As well as partly defraying the financial outlays of the successful party, the court's power to award expenses acts as a discipline promoting efficient procedure in that it provides a sanction, both through making an award and determining the basis for taxation, in the event of conduct which has been unnecessarily wasteful of time or money. One such situation is where a party has failed to beat a tender but there are many others where the court may wish to penalise unreasonable or culpable conduct."***

8. The first thing the Court must do is to decide whether costs ought to be awarded in the case. This was a judicial review matter and therefore I should bear in mind the possible consequences of making a costs order may have on prospective applicants. I think an applicant ought not to be deterred from

challenging decisions or processes of judicial and administrative bodies which may be erroneous or flawed out of a fear he may be mulcted in costs. Conversely, an applicant may be dissuaded from bringing unmeritorious claims by the prospect of costs being awarded against him.

9. Still, there may be occasions where an applicant in a judicial review case is successful, for an award of costs to be made because it would be unreasonable for such applicant to bear those legal costs incurred as a result of the impugned actions of a respondent. I recognise the question of the reasonableness of the expenses incurred in pursuit of his claim has to be considered. It seems to me therefore, that the Court must strike a balance between placing a successful applicant in as near a financial position as he may have been had it not become necessary for him to assert his legal claim while ensuring he has not gone to unreasonable lengths in pursuit thereof.

10. Also, I may, in appropriate cases, deprive a successful party of his costs, e.g., if I was to find that party's behaviour precipitated the action which failed on a technical ground. There may be cases where the issues involved were of general public importance and their resolution provided salutary guidance for good administrative practices in the future. In such a case it may be appropriate not to award any costs at all.

11. There has been much said about who was or was not successful in this case. Mr. Munroe submitted that notwithstanding the Applicant was not granted

any of the reliefs she sought, she ought not to be made to pay the Respondents' costs. He posited that in respect of the JLSC, the Court did make a number of findings which favoured the Applicant, suggested that she deserved to be vindicated and concluded the Court's ruling was a sufficient vindication. He argued that it would be strange if she was now required to pay costs in the face of the Court's ruling.

12. In respect of the AG Mr. Munroe argued that I should have regard to the part the AG played in this matter by recommending the Applicant to the Deputy Law Reform and Revision Commissioner post, receiving and mentioning a Security and Intelligence Branch report he ought not to have received and evincing an intention to prohibit the Applicant from prosecuting criminal cases. He made reference to the letter written by Permanent Secretary, Harrison Thompson, dated 4 May 2010 where mention is made of - and I paraphrase – potential personality conflicts involving the Applicant. He pointed out that the AG had entered an unconditional appearance in this case. He suggested that the Court should make a "Sanderson and Bullock Order". This would essentially mean the Applicant would recover her costs against the JLSC and the JLSC would be ordered to pay the AG's costs.

13. Mr. Evans, QC contended that the Court must be guided by the words "***the costs to follow the event***". He submits that the Court did not grant any relief sought by the Applicant and its denial of each relief is ***"the event"***; and that means the Applicant was the unsuccessful party in this case. He submitted that she should be made to pay his client's costs because the JLSC is a successful party entitled to its costs. He submitted also that there was no predominant public interest element in this case. It was a matter involving issues more personal to the Applicant hence the court should not be influenced by the judicial review

process she has employed. He urged on the Court to award costs in the matter to his client sufficient for two Counsel.

14. Mr. Simms, QC put his client's case much higher in that the AG was found not to be a proper party at all to these proceedings because the constitutional issues raised by the Applicant were caught by the proviso to Article 28 of the Constitution of the Commonwealth of The Bahamas ***("the Constitution");*** and there was no other reason for him to be joined as a party. He argued his client should be awarded his costs in the matter because he was made an unnecessary party to the action. Mr. Simms cited two Barbadian cases in support of his position: Scotland District Association Inc. v The Attorney General, et. al., Action No. 938 of 1996 and IDM Direct Marketing Corporation v The Attorney General, et. al. No. 1188 of 1996. He too requested that the costs be ordered as sufficient for two Counsel.

15. Mr. Evans submitted that the Court should not make an issue based award of costs in this case as he viewed it as an inappropriate case in which to do so. In this regard I have considered the decision of Coulson, J in McGlinn v Waltham Contractors Ltd [2007] EWHC 698 and the authorities therein cited.

16. I considered the submissions of Counsel and the authorities cited by them. I treat the decided cases, as Mr. Evans suggested, as guidance only. They cannot bind the discretion invested in the Court by section 30 of the Supreme Court Act. I find the two cases cited by Mr. Simms helpful but not for the reason he made use of them.

17. The Applicant failed in her effort to satisfy the Court she should receive any of the reliefs she sought. However, whereas I denied her any relief, I did find that the JLSC failed to treat her fairly and that the advice tendered to the Governor-General was flawed because the JLSC considered material they should not have had in their contemplation when they purported to do so. When regard is had to the overall case of the Applicant, the plank upon which it is based mainly is the wrongfulness of the JLSC's decision to move her from the post of Deputy DPP and appoint her Depurt Law Reform and Review Commissioner; and I agreed with her view of that decision.

18. The Applicant's contention that the JLSC's decision was flawed was borne out on the evidence. That she was not declared to still be the Deputy Director of Public Prosecutions was due only to the Court's opinion it would be a pyrrhic victory. In the circumstances the Applicant is to be regarded as the successful party vis a vis the JLSC. However, her action against the AG failed and, in the normal course of things he is entitled to his costs.

19. It is unusual for the AG to pursue his costs in matters involving constitutional and public law, e.g., Liversidge v Anderson [1942] AC 206; but his forbearance generally, cannot circumscribe his entitlement to costs when he insists on pursuing his claim thereto. I hold the view however, that the AG ought not to receive the whole of his costs in this matter despite my conclusion that he is a successful party.

20. In this case the AG entered an unconditional appearance which means he did not object to being joined as a party to these proceedings at the outset. On 8 October 2010 when objection was taken by the JLSC to the form of the Applicant's application and to strike out the Applicant's leave to apply, the AG did not join in that application and did not raise any other objection at that time. Even then I would have noted that the Court had already made directions for the due conduct of this case and had set a date for its hearing.

21. The timing of the AG's objection to being a party is of some moment to my decision in this case. It is true that in January 2011 the AG endeavoured to detach himself from these proceedings but was restrained from doing so by a ruling of the Court. However, his initial position would have fortified the Applicant's view of the AG as a proper party; and to my mind disclosed his acquiescence to being a party at the time.

22. In the two cases cited by Mr. Simms Counsel took the points in limine – an early stage of the proceedings – that the AG of Barbados was not a proper party. It is in those circumstances that the court would have granted the AG his costs. The application to have the AG released from these proceedings was not made timeously. I hold the view that if the AG is to be awarded his costs such costs must reflect that the AG entered an unconditional appearance; and the lateness of the application to be discharged from these proceedings.

23. It seems to me therefore, that while the Applicant was not successful in her suit against the AG, she ought not to be required to pay all of the AG's costs. I make my order pursuant to Order 59 rule 9(4) of the RSC. It reads:

> ***"(4) The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled —***
>
> ***(a) to a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or***
>
> ***(b) to a gross sum so specified in lieu of taxed costs."***

24. I have borne in mind that the Applicant did not succeed on a number of issues she raised against the JLSC but I do not think that they made any substantial difference to the length of time it would have taken to resolve the real dispute between the parties. Although, I agree with Mr. Munroe that it would not be consonant with the findings of the Court to now seek to penalize the Applicant for the breadth of her challenge, she ought not to receive a proportion of her costs. "Vindication" requires that the JLSC bears the costs of the Applicant in this case but not the whole of such costs.

25. I have considered Mr. Evans' submission that the Court must consider that costs will have to be borne by the public purse. While I view that as a circumstance I may take into account, it bears very little weight on my decision because I am of the opinion that possible loss to the public purse is a matter which ought to be of greater concern to those whose decisions may give rise to legal challenges; and ought not to limit recouping of the reasonable costs incurred by an applicant in challenging the impugned decisions.

26. I have considered Mr. Evans' submission that the JLSC was candid and forthright in the manner it conducted its case by providing its decisions and the reasons therefore for the Court to scrutinise. I opine that that is what is required of the JLSC in any event and such candor is its own reward.

27. In the premises, I opine that the Applicant ought to receive ninety per cent of her taxed costs in this matter if costs are not previously agreed. These costs are to be paid by the JLSC. The costs are fit for two Counsel.

28. The AG is to receive twenty per cent of his taxed costs from the Applicant, if costs are not previously agreed. The costs are fit for two Counsel.

29. Looking at the matter in the round, I believe that the results of my consideration of the costs, achieves the necessary justice as between the parties.

Dated this 4th day of April, 2011.

Jon Isaacs
Hon. Senior Justice