



[2020] JMFC Full 03

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE FULL COURT**

**CLAIM NO. 2013HCV05366**

**BEFORE:**           **THE HON. MS. JUSTICE C. LAWRENCE-BESWICK**

**THE HON. MS. JUSTICE J. STRAW**

**THE HON. MR. JUSTICE D. FRASER**

<b>BETWEEN</b>	<b>BRENTON HENRY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>HER HONOUR MRS. D. GALLIMORE-ROSE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**(Considered based on previous oral and subsequent written submissions)**

**Hadrian Christie instructed by Jerome Spencer of Patterson Mair Hamilton for the claimant**

**Mrs. Nicole Foster-Pusey QC, Ms. Carlene Larmond and Ms. Carla Thomas instructed by the Director of State Proceedings for the defendants**

July 15, 2020

*Administrative Law – Constitutional Relief – Judicial Review – Principles on which Costs should be awarded*

**LAWRENCE-BESWICK J**

**[1]** I have had the privilege of reading the draft judgment of my learned brother. I agree with his reasoning and conclusions and have nothing further to add.

## **STRAW J**

[2] I have also had the privilege of reading the draft judgment of my learned brother. I agree with his reasoning and conclusions and have nothing further to add.

## **D. FRASER J**

### **Introduction**

[3] In the substantive application in this matter filed by Fixed Date Claim Form on November 21, 2013, the claimant sought the following relief:

- a. An order for certiorari, quashing the decisions of the 1<sup>st</sup> defendant to impose bail conditions on the claimant on diverse days;
- b. An order of certiorari, quashing the order of the 1<sup>st</sup> defendant refusing to grant the stay and to remit the application for stay before another Judge of the Family Court;
- c. An order of certiorari, quashing the decisions of the 1<sup>st</sup> defendant to commit the claimant to prison on diverse days;
- d. Declarations that the 1<sup>st</sup> defendant has infringed the claimant's Fundamental Rights and Freedoms to:
  - i. liberty (section 13(3)(a));
  - ii. freedom of movement (section 13(3)(f));
  - iii. equality before the law (section 13(3)(g));
  - iv. freedom of the person (section 13(3)(p)); and
  - v. due process (section 13(3)(r));
- e. Damages for assault, battery and false imprisonment;
- f. Constitutional/Vindictory Damages;
- g. Interest on damages;
- h. Costs; and
- i. Such other remedies as this Honourable Court may see fit.

[4] In our judgment in the matter **Brenton Henry v HH Mrs. D. Gallimore-Rose and The Attorney General** [2016] JMFC Full 10, refusing the relief sought, we made the following orders:

1. Judicial Review refused;
2. Orders for Certiorari are refused;
3. Declarations are refused;
4. Damages are refused; and
5. The issue of costs reserved for submissions to be made in writing by counsel.

[5] Submissions in writing were received only on behalf of the defendants. Counsel for the claimant is taken to have rested on relevant oral submissions he made during the course of the hearing.

### **The Relevant Costs Orders**

[6] Over the life of the claim the following orders were made in respect of costs:

- a. Order of Anderson J on November 8, 2013 that the costs of the claimant's application for extension of time within which to apply for leave to apply for judicial review and costs of the claimant's further amended application for leave to apply for judicial review shall be costs in the claim;
- b. Order of Sykes J, (as he then was), on January 14, 2014 at the first hearing that costs of that hearing should be costs in the claim;
- c. Order of Cole-Smith J on June 4, 2014 adjourning the hearing of the claim to December 1, 2 and 3, 2014 and setting the defendants' application for an extension of time to file an affidavit/ and for the affidavit to stand for October 2, 2014. The issue of costs was reserved for the substantive hearing;
- d. Order of C. Brown J (Ag), (as she then was), on October 2, 2014 granting the defendants' application for extension of time to file further affidavit/for

affidavit filed to stand. The issue of costs was reserved to the substantive hearing;

- e. Order of this court on February 2, 2015 adjourning the part-heard matter at the instance of the defendants. The issue of costs was reserved;
- f. Order of this court on April 17, 2015, refusing the application of the defendants for an extension of time to file affidavits. Costs of that application were already awarded to the claimant, therefore no submissions were required; and
- g. Order of this court on December 20, 2016 dismissing the claimant's claim for the relief sought, with the issue of costs being reserved for submissions to be made in writing by counsel.

### **The Applicable Law/Rules**

- [7] The starting point is always that the decision to award costs is discretionary. If the court decides to make a costs order, the general rule is that the unsuccessful party pays the costs of the successful party, that is, costs should follow the event: (See rule 64.6 (1) of the Civil Procedure Rules (CPR)). That general rule may however be displaced depending on particular factors such as those outlined in rule 64.6 (4). See ***Branch Developments Ltd t/a Iberostar v Industrial Disputes Tribunal and the University and Allied Workers' Union*** [2016] JMCA Civ 26.
- [8] In administrative law proceedings a different general rule applies, in 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 (CPR rule 56.15(5)). See also ***Gorstew Ltd v Her Hon Lorna Shelly Williams and Ors*** [2016] JMSC Civ 71.
- [9] In the case of ***Toussaint v Attorney General of St. Vincent and the Grenadines*** [2007] UKPC 48 the Judicial Committee of the Privy Council outlined that the aim of rule 56.15(5) is to encourage administrative law applications, and that it does not prohibit an award of costs being made in favour of a successful applicant. However where an applicant is successful, in a situation where the court has

accepted the defendants' submissions on important issues, the court may apportion costs in a manner to reflect that. See ***University of Technology Jamaica v The Industrial Disputes Tribunal and the University and Allied Workers Union*** 2009HCV1173 (April 23, 2010).

### **Submissions and Analysis**

- [10] Counsel for the defendants' Ms. Thomas<sup>1</sup> submitted that the claimant acted unreasonably in bringing the claim because the committal orders which were the subject of the claim were in respect of maintenance orders which the claimant had substantially failed to comply with. Further, at no time did the claimant dispute that sums were owed. Therefore, the claimant should be ordered to pay the costs of the proceedings.
- [11] We have given due consideration to this submission but consider that the claimant raised a number of significant legal points in his claim concerning, among other things, whether Resident Magistrates, (as the first defendant then was), were liable in their personal capacities for actions taken in discharge of their judicial functions; the applicability of the **Bail Act** in civil proceedings; and the process that must be followed before the committal of a defendant is ordered for breach of a maintenance order.
- [12] We therefore do not find that the applicant acted unreasonably in making the application. There was also no complaint that he acted unreasonably in the conduct of the application. Accordingly, we do not find that there is a basis to depart from the general rule in administrative proceedings, that no order for costs should be made against an applicant for an administrative order.

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<sup>1</sup> Except as otherwise indicated, all submissions on behalf of the defendants were in writing and made by Ms. Carla Thomas.

***Orders at paragraph 6 a and b***

- [13] These orders being orders for costs to be in the claim, in light of the finding in the preceding paragraph that the claimant did not act unreasonably, no order for costs will be made in relation to them.

***Order at paragraph 6 c***

- [14] The adjournment referenced in the order was granted to facilitate the defendants' subsequent application for an extension of time to file an affidavit / and for the affidavit to stand. Counsel for the defendants advanced that if the court was of the view that the claimant should not pay the defendants' costs then the court ought to exercise its discretion in favour of the defendants and make no order as to costs or order that each party should bear their own costs.
- [15] Counsel further submitted that if the court was minded to award costs for the adjournment on that occasion, then it should be limited to costs for one day for counsel. In respect of any expenses attendant to that June 4, 2014 court hearing, counsel maintained the claimant should be allowed only to recover the costs of airfare subject to proof that his travel was for the clear purpose of his attendance at the Supreme Court hearing, bearing in mind the evidence that he would visit the island on occasions: (*see paragraph 3 of his affidavit filed on November 21, 2013 and paragraph 42 of the affidavit of Dionne M. Rose-Gallimore filed on May 28, 2014*).
- [16] We agree that costs limited for one day for counsel are appropriate. The matter was set for hearing but could not proceed as the defendants had not complied with the case management orders to file their affidavits within the allotted time. However, as we are unaware of the circumstances that led to the claimant being in the island, we accept the submission of counsel for the defendants in relation to this claim for airfare. We therefore make an award of costs for airfare, subject to it being demonstrated to the Registrar of the Supreme Court that the purpose of his travel to Jamaica was for the aborted hearing. Naturally, one of the key factors that would have to be borne in mind is his travel schedule, that is, how proximate to the

scheduled dates of hearing the claimant travelled to the island and how soon after those dates he departed.

***Order at paragraph 6 d***

- [17] Counsel for the defendants accepted that the application for extension of time having been made by the defendants, the claimant would usually be entitled to the costs of the application. However, counsel advanced that if the court was minded to apply the rule that the claimant ought not to be ordered to pay any costs of these administrative proceedings, as the defendants would be deprived of their costs for the claimant's application for extension of time and for leave to apply for judicial review, in the exercise of its discretion, the court ought to order no costs in respect of this application.
- [18] We have carefully considered the submissions of counsel on this point. However we note that the defendants' application for extension of time was before and separate from the review hearing itself. It is also the case that, as will be seen under 6f below, costs of a subsequent failed application by the defendants for extension of time to file further affidavits prior to the hearing were already awarded to the claimant. While this application was successful and that one was not, the fact still remains that as counsel acknowledged, the costs of such an application would ordinarily have gone to the claimant. The fact that the claimant is protected by the Civil Procedure Rules from being exposed to costs occasioned in an unsuccessful review, does not therefore mean that in this case the claimant should be deprived of costs in hearings prior to the actual review. Costs of this application are therefore awarded to the claimant.

***Order at paragraph 6 e***

- [19] The request for the adjournment on February 2, 2015 was precipitated by the fact that counsel for the Director of State Proceedings who commenced the matter left the Chambers of the Attorney General after the previous hearing date and the Chambers needed time to put alternative arrangements in place for the defendants' representation. The letter to counsel for the claimant from the

chambers of the Attorney General advising of the difficulty was dated January 27, 2015.

- [20] Counsel for the claimant in oral submissions on February 2, 2015 indicated that he was seeking an order for costs as the claimant had travelled from the United Kingdom for the hearing. He indicated the claimant was asked to attend, wanted to attend and was only made aware of the pending application one day prior to his departure. He therefore asked for costs for the day and for the claimant's hotel accommodation to cover one day before the hearing, two days for the scheduled hearing and one day after. He indicated that the claimant arrived on Wednesday January 28, 2015 and the next available flight out was Wednesday February 4, 2015.
- [21] In oral submissions also on February 2, 2015, Mrs. Foster-Pusey QC indicated the costs for the day would not be opposed, as counsel for the claimant was first made aware of the pending application for an adjournment on January 27, 2015. It was also indicated that the airfare costs would not be opposed. Counsel however registered difficulty with the claim for accommodation in light of the fact that the attendance of the claimant was not required by the court and based on the evidence the claimant could have made other arrangements for accommodation. Therefore, if any compensation was to be made for accommodation the necessity of the costs incurred would have to be investigated, as on the face of it that part of the claim was unreasonable.
- [22] In written submissions counsel for the defendants Ms. Carla Thomas advanced that for the reasons previously outlined in respect of the order at paragraph 6d the court should make no order for costs. Counsel however departed from the position adopted in the oral submissions by contending that the claimant ought only to be granted the costs of airfare, subject again to the requirement of proof that travel was for the sole purpose of the hearing at the Supreme Court.
- [23] Concerning accommodation expenses, counsel expanded on the oral submissions that had been previously advanced and stated that no costs ought to be granted unless the court was satisfied that they were in fact incurred by the claimant as he

may not have incurred any. This particularly as the claimant was in Jamaica as often as annually or biannually and there was evidence that suggested that he may have been part owner of a house in Coral Gardens: (*See for example, the evidence of his visits to the island to see his grandmother detailed in his affidavit filed November 21, 2013 and exhibit 33 to the affidavit of Dionne M. Gallimore-Rose filed on May 28, 2014.*)

- [24] The concession of the learned Solicitor General that costs for the day and for airfare would not be opposed, was reasonable, in light of the late notice given to the claimant of the difficulty which necessitated the application for an adjournment. In all the circumstances we consider that in addition to the airfare, the claimant should be awarded costs for the 1<sup>st</sup> scheduled day of the adjourned hearing and also for his hotel accommodation to cover one day before the hearing, and the two days for the scheduled hearing, bearing in mind that the seat of the court is in Kingston and the private accommodation of the claimant seems to be in St. James.

***Order at paragraph 6 f***

- [25] Costs of this failed application of April 17, 2015 by the defendants for an extension of time to file affidavits were already awarded to the claimant.

***Order at paragraph 6 g***

- [26] In keeping with our conclusion at paragraph 12, that there is no basis to depart from the general rule in administrative proceedings that no order for costs should be made against an applicant for an administrative order, in respect of the order of December 20, 2016 reserving the issue of costs of the judicial review hearing, we will make no order as to costs.

***General Submissions on the Application of Costs Awarded***

- [27] It was further submitted by counsel for the defendants that should the court exercise its discretion to grant any costs to the claimant, then in light of the claimant's continued neglect and failure to make maintenance payments which are legally due and owing, the court should make an order restraining the claimant from receiving these monies and directing that the payment of these monies be

made to the complainant in the proceedings before the Parish Court, pursuant to section 22 of the **Crown Proceedings Act**. Such an order would be appropriate having regard to the fact that the evidence was that the claimant substantially failed to maintain his child practically from the date of the then Resident Magistrate's Court's order in 2009. Therefore any monies due to the claimant, should be made to count towards the order for the retroactive maintenance sum of \$200,000.00.

- [28] Section 22 (1) of the **Crown Proceedings Act** provides as follows:

Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, the Supreme Court may, subject to the provisions of this Act and in accordance with rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that person.

- [29] The court notes that there is a proviso to this subsection with three exceptions, but also that none is relevant in this situation. The submission of counsel for the defendant commends itself to the court. The dereliction of the claimant in meeting his obligations to his child are well documented in the judgment on the substantive issues. But for his persistent default, this whole case would not have arisen. Any costs due to him, should therefore be first applied to any outstanding portion of the \$200,000.00 maintenance sum, which remains owing at the date of this judgment.
- [30] We apologise for the delay in the delivery of the judgment on this aspect of the proceedings. The undoubted inconvenience caused is sincerely regretted.

## **Disposition**

[31] The following are therefore the final orders:

- a. In respect of the issue of costs ordered to be in the claim on November 8, 2013, and January 14, 2014 we make no order as to costs;
- b. In respect of the issue of costs reserved from June 4, 2014, costs limited for one day for counsel for the claimant are awarded. Costs are awarded to the claimant for airfare subject to it being demonstrated to the Registrar of the Supreme Court that the purpose of the claimant's travel to Jamaica was for the hearing;
- c. In respect of the issue of costs reserved from October 2, 2014, costs of that application are awarded to the claimant;
- d. In respect of the issue of costs reserved from February 2, 2015, costs limited for one day for counsel for the claimant are awarded. Costs are also awarded to the claimant for airfare as well as to cover hotel accommodation for three days to include one day before and the two days of the scheduled hearing;
- e. Costs of the application of April 17, 2015 were already awarded to the claimant;
- f. In respect of the order of December 20, 2016 reserving the issue of costs of the judicial review hearing, there is no order as to costs; and
- g. Pursuant to section 22 (1) of the **Crown Proceedings Act** the claimant is restrained from receiving any payment due to him up to the amount of any outstanding portion of the \$200,000.00 maintenance sum, that remains owing at the date of this judgment. The court directs that any such outstanding sum shall be paid by the Crown to Ms. Paulette Rhamjus, the mother of the child 'BH' fathered by the claimant, or to a person authorised by Ms. Rhamjus, to receive payment on her behalf. Any sum above that which is owed for maintenance, if any, should then be paid by the Crown to the claimant.