IN THE HIGH COURT OF JUSTICE

C.V. 2011/2027

BETWEEN

**RUBY THOMPSON-BODDIE**

**LENORE HARRIS**

APPLICANTS

AND

**THE CABINET OF TRINIDAD AND TOBAGO**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

RESPONDENTS

**BEFORE THE HONOURABLE JUSTICE RICKY RAHIM**

**Appearances:**

Mr. D. Mendes SC and Mr. M. Quamina instructed by Mr. A. Bullock for the Applicants.

Ms. D. Peake SC instructed by Ms. C. Moore for the First Respondent

Mr. R. Martineau SC instructed by Mr. G. Ramdeen and Ms. A. Baksh for the Second Respondent

## Reasons for Decision as to Costs

Following the oral delivery of its decision in relation to costs in this matter, the court is of the view that it is necessary to give full written reasons for its decision. These are the full written reasons for the oral decision made by the court and delivered on 7th June 2011.

This was an application for leave to make a claim for judicial review of a decision by the Cabinet of Trinidad and Tobago and/or the Attorney General not to advise His Excellency the President to re-appoint the applicants as members of the Industrial Court. The application included a claim for immediate interim relief and therefore the court was mandated by **Part 56.4 (3)** of the **Civil Proceedings Rules 1998 (as amended) (CPR)** to direct a hearing in open court. Upon the matter coming up for hearing, the applicants sought and was granted leave by the court to withdraw the application on the basis of new information that a decision in the substantive cause had in fact **not** been made. Leave was granted to the applicants to withdraw their application made on the 27th May 2011. The court thereafter heard submissions on costs from counsel for the applicants and the respondents.

The applicants have applied for an order that the costs of their permission application be paid by the second respondent (hereinafter referred to as the first application) and the first respondent has applied for an order that its costs be paid by the applicant (hereinafter referred to as the second application).

The court's powers to make orders in relation to costs include the power to make orders requiring a party *or* person to pay the costs of another person arising out of or related to all or any part of any proceedings **See Part 66.3, CPR.** The general rule is that the successful party is entitled to costs, that is, the unsuccessful party pays the costs of the successful party **Part 66.6(1), CPR.**

In the court's view, there is no distinction in principle between the refusal of an application for leave and the withdrawal of such application when making a determination as to which party is successful, in that, both result in an outcome of which it can be said that the applicant is the "**unsuccessful**" party consistent with the language of **Part 66.6 CPR**.

**The First Application**

As regards the first application, the applicants submit that although the applicants did not succeed, the second respondent should nonetheless be ordered to pay the costs of the application for leave. It is their contention that the general rule provided for in **Part 66.6 (1) CPR,** should not apply in this case, as were it not for the conduct of the second respondent and his failure to abide by the pre-action protocol practice directions, it would not have been necessary for the applicants to seek leave to claim for judicial review.

The **Pre-Action Protocols 2.1** sets out as follows:

*The court may treat the standards set out in protocols as the normal reasonable approach to pre-action conduct. The court will expect all parties to have complied in substance with the terms of an approved protocol. If proceedings are issued the court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court) or Part 66 (Costs- General).*

The **Pre-action Protocol for Administrative Orders**, by way of the Practice Direction at **Appendix D**, prescribes that the letter sent by a claimant in an administrative claim should normally be responded to within 30 days and that failure to do so will be taken into account by the court in exercising its discretion pursuant to **Part 66** of the CPR (**See 3.1 Appendix D**). The effect of this protocol appears to be as suggested in the recommended format for the letter of claim as outlined at **Annex A**, that is, that the precise time for response will depend upon the circumstances of the individual case. However, although a shorter or longer time may be appropriate in a particular case, 30 days is a reasonable time to allow in most circumstances.

The question for the court's determination therefore is whether the circumstances were such that a period of less than 30 days for a response from the second respondent can be considered reasonable in this case bearing in mind that the pre-action protocol letter addressed to the second respondent was dated 6th May 2011 and allowed a period of 10 days for response.

**Part 66.6 (5) of the CPR** sets out that in deciding who should be liable to pay costs, the court must have regard to, inter alia, the following the circumstances:

(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 the claimant gave reasonable notice of his intention to issue a claim.

Depending on the nature and substance of the claim, some of the circumstances listed above may carry more weight than others. The court has considered all of these circumstances in turn as they apply to this case.

By **Part 66.6 (6)(a), CPR,** the conduct of the parties includes-

> *conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol.*

An examination of the correspondence between the parties prior to the pre-action letter sent on 6 May 2011 may therefore be of assistance. It must be clearly stated that in reviewing the correspondence this court has made no findings of fact whatsoever as regards the merits of the application for leave or the facts upon which the application for leave was founded.

The correspondence prior to the institution of proceedings showed as follows:

1) The Honourable President of the Industrial Court wrote to the second respondent on several occasions concerning the re-appointment of the applicants following a recommendation made in that regard since March, 2010. There was no response until 10th December 2010.

2) By letter dated 24th January 2011, the second respondent responded to the letter of Dana Seetahal SC, then attorney-at-law for the applicants, and confirmed that Cabinet was giving consideration to the re-appointment of the applicants (see letter of Anthony Bullock, attorney-at-law, dated 6th May 2011 at paragraph 2). It must be noted that although the letter of the 24th January 2011 from the second respondent is mentioned in Mr. Bullock's letter of 6th May 2011, a copy of same was not produced.

3) By letter of the 6th May 2011, attorney-at-law for the applicants wrote to the second respondent by way of pre-action protocol letter indicating that if the appointments were not made by 16th May 2011, the applicants would commence legal proceedings thereafter.

4) On 16th May 2011, the Honourable President of the Industrial Court wrote to the second respondent again expressing his concerns about the non-reappointment of the applicants. The second respondent responded with almost immediate dispatch on 17th May 2011. Still, it was not clear from this letter whether a decision in respect of the applicants had been made up to that time.

5) However, there was no response from the second respondent to the pre-action letter sent by Mr. Bullock on 6th May 2011. The application for leave was filed on 27th May 2011, some twenty one days after the pre-action protocol letter. It therefore means that a period of some twenty one days had expired without a direct response to the pre-action protocol letter and before the institution of legal proceedings.

In this case, the decision to re-appoint the applicants in not necessarily connected to or predicated upon the expiry of the presidential extensions granted to them which are due to expire on the 9th June 2011. In the circumstances, there appears to be no justification for the applicants' allowance of twenty one days *only,* for a response to the pre-action protocol letter as opposed to the period of thirty days which is suggested by the **CPR** as reasonable in the normal course of events.

While a shorter period than thirty days may be reasonable in some cases, in the court's view this was not one of those cases.

The apparent tardiness of the second respondent in not replying to the concerns of the Honourable President of the Court between 24th January 2011 and 17th May 2011, along with his failure to respond to the pre-action protocol letter of the 6th May 2011, does not derogate from the duty of the applicant to allow for a reasonable time for a response to a pre-action protocol letter in terms of that prescribed by the **CPR** in the normal course of events. It must be emphasized that one of the main purposes of the pre-action letter is to enable parties to avoid litigation by agreeing settlement of a claim before commencement of proceedings. A pre-action protocol letter is also an indication for the first time in a formal manner that legal proceedings are being contemplated. Allowing the other side an inadequate or unreasonable period within which to respond to a pre-action letter does not achieve or assist in the fulfillment of the objectives of the pre-action protocols.

In sum, it may well be, that the failure of the applicants to allow for the period recommended by the **CPR** for response by the second respondent resulted in a premature application for leave to challenge a decision which had not yet been made. In making its assessment, the court appreciates that the applicants may have genuinely believed that the silence of the second respondent coupled with the similarity of circumstances experienced by their former judicial colleague left them with little choice but to commence legal proceedings in the absence of

evidence of a decision. But be that as it may, the applicants were nonetheless duty bound to comply with the provisions of the **CPR**.

It is therefore the finding of this court that it would not be fair in the circumstances to order the second respondent to pay the applicants' costs having regard to the conduct of the applicants in failing to comply with the provisions of the **CPR**. In the court's view, the conduct of the applicants in failing to give reasonable notice of intention to issue a claim was the circumstance listed at **Part 66.6 (5) of the CPR** which carried more weight than any other.

**The Second Application**

In order for the first respondent to succeed, the court has to be persuaded that the circumstances of this case were exceptional within the meaning so defined in the matter of **R (Mouth Cook Land Limited) v Westminster City Council [2003] E.W.C.A Civ. 1346)**.

In **Harinath Ramoutar v Commissioner of Prisons Civ. Appeal 112/2009,** their Lordships of the Court of Appeal had cause to consider anew the issue of the award of costs on a permission application. Delivering the decision of the court, Mendonca JA stated at paragraphs 46 and 47:

> *In the **Abzal Mohammed** case which was decided after the Judge gave her decision and so was not available to her, the Court of Appeal gave guidance on appropriate cost orders in judicial review proceedings. In a case such as this where the Judge treated what was an ex parte application for leave to make a claim for judicial review as an inter*

*partes application and invited the assistance of the proposed defendants, the Court of Appeal was of the opinion that the appropriate order, where the application for permission was refused, should be no orders to costs. Kangaloo, J.A. who gave the judgment of the Court stated:*

'If leave is refused, it is unfair to the claimant to have to pay costs to the proposed defendant. In the first place, the proposed defendant is not yet a party and secondly it was brought to Court not by the Claimant but by the Court itself for assistance. I would think the proposed defendant would again have to bear its own costs.'

*The Court was not there laying down a rigid rule from which there can be no departure but rather setting out a general rule from which a Court may depart in exceptional circumstances. It is of course not possible to list fully what circumstances are exceptional. However in* ***R (Mouth Cook Land Limited) v Westminster City Council [2003] E.W.C.A Civ. 1346)*** *Auld LJ stated that exceptional circumstances may consist in one of several features which he described in a non-exhaustive list."*

According to Auld LJ, exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:

a) the ***hopelessness*** of the claim;

b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;

c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends, a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and

d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.

Further, according to Auld LJ, a court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant.

Such an approach, according to Auld LJ, seems to accord with public policy in providing ready access to the courts by individuals or bodies seeking relief from and/or to draw attention to actual or threatened transgressions of the law by public bodies, whilst, in exceptional cases protecting those bodies and the public that funds them from unnecessary, burdensome and costly substantive litigation.

In this case, there being no decision upon which to mount a challenge, it may well be argued that the case for the applicants was hopeless. This is however but one factor that the court may consider in making a decision on the issue of the existence of exceptional circumstances.

In this regard, the court notes that prior to the appearance at the permission hearing, the position as to whether a decision had in fact been made was, from all the correspondence on the record, somewhat unclear.

At the hearing, learned senior counsel for the applicants initially sought a stay of proceedings and indicated that his clients had been informed by the Honourable President of the Industrial Court that he, the Hounourable President, had held a conversation with the second respondent on 27th May 2011, the same day on which the application for leave was filed. On that occasion, the second respondent apparently informed the Honourable President that a decision had not yet been taken. On 1st June 2011, the applicants' attorneys-at-law wrote to the second respondent indicating that they had heard from their clients that a decision apparently had not been taken and that if that was the case, then they would have to dispose of the application for leave at the hearing. On 2nd June 2011, the second respondent wrote to the Honourable President requesting further information (the nature of which is unknown to the court) and for the first time, indicating in writing, that no decision had in fact been taken in respect of the appointments.

The court has not had sight of these two letters but has no reason to dispute their existence, the information emanating from eminent senior counsel. It appears though, that the second

respondent had not responded in writing to either the pre-action protocol letter of the 6th May 2011, or the letter of 1st June 2011, sent by attorneys-at law for the applicant to the second respondent. A **definitive** statement in **direct answer** to counsel for the applicants on the issue appears to have been forthcoming at the hearing when learned senior counsel for the second respondent stated in open court that no decision in respect of the appointments had yet been taken. It appears to the court that while the second respondent may have been communicating with the Honourable President of the Industrial Court, there was little, if any, direct communication with attorneys-at-law for the applicants. Consequently, up to the hearing, there appears to have been no **direct**, **definitive** indication to attorneys-at-law for the applicants of the fact that a decision had not been made. Neither were they informed as to the person or body responsible for making such a decision.

Upon the representation of learned senior counsel for the second respondent, the applicants did not persist and sought the court's leave to withdraw. As a consequence, there has been no need for legal arguments on the permission application. In the court's view, the decision of the applicants not to pursue the application after having been alerted to a fact which clearly demonstrated its hopelessness, namely the absence of a decision, is a matter which weighed heavily in the favour of the applicants when considering whether exceptional circumstances existed consistent with the definition set out in **Westminster City Council** (supra).

Further, the court is of the opinion that the applicants have not sought to abuse the process of judicial review for collateral ends. Suffice it to say, that the matter of the intended proceedings

raises issues of national importance which would appear prima facie to touch and concern the perception of judicial independence of the bench of the industrial court. The application may have been premature but it was certainly not an abuse of the process as contemplated by **Westminster City Council.**

In the circumstances, this court finds that no exceptional circumstances exist which would justify a departure from the general principle regarding an order for costs against an applicant in respect of an application for leave of this type and therefore no such order is made.

In addition to the order for leave to withdraw the application granted on 3rd July 2011, there shall be no order as to costs.

Dated this 8th June 2011.

Ricky Rahim

Judge