Neutral Citation Number: [2023] CA (Bda) 1 Civ

Case No: Civ/2021/11

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 092

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 06/02/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

THE CORPORATION OF HAMILTON

Appellant

- and -

(1) THE ATTORNEY-GENERAL
(2) THE GOVERNOR OF BERMUDA

Respondents

Jeffrey Jowell, KC instructed by Ronald Meyers, Marshall, Diel & Myers, for the Appellant
Delroy Duncan KC and Ryan Hawthorne instructed by Lauren Sadler-Best of the Attorney-General's Chambers, for the Respondents

Hearing date(s): On the papers

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APPROVED RULING ON COSTS

CLARKE P:

1. On 18 March 2022 we dismissed the appeal of the Corporation of Hamilton ("the Corporation") against the decision of the Chief Justice. In the last paragraph of my judgment, with which my Lord and My Lady agreed, I said that, subject to any further submissions, the Corporation should pay the respondents their costs of and occasioned by the appeal to be taxed on the standard basis. Submissions were duly filed by the Corporation to the effect that we should make no such order. This is our decision in the light of the sequence of submissions by the parties as to what costs order should be made.

2. In these proceedings the Corporation contends that the decision of the Government of Bermuda to convert the Corporation into what it would describe as a quango would, if it had been implemented, by the enactment of the Municipalities Reform Bill 2019, result in the passing of an Act which would contravene sections 1 and 13 of the Bermuda Constitution Order 1968 ("the Constitution").

3. One of the several effects of the proposed Reform Act, if enacted, would be that municipal elections would be abolished and replaced by the selection and appointment of Members of the Corporation by the Minister, or by the Minister acting on the recommendation of a Selection Committee the members of whom were persons appointed by the Minister. The Corporation's central complaint was that the level of control which various Municipal Amendment Acts already passed had imposed and which the Reform Act, if passed would, itself, impose, amounted to a deprivation of the Corporation's property - contrary to sections 1 and 13 of the Constitution. The extensive control over the Corporation afforded by the various Amendment Acts already passed is set out in paragraph 12 of the judgment.

4. My judgment is lengthy, and no useful purpose would be served by attempting a precis of any substantial length. It is sufficient to say that, in paragraph 244, I reached the following conclusions:

   (a) Section 1 of the Constitution does not have independent force;

   (b) There has been no breach of the Corporation's common law right to the protection of the law;

   (c) Section 7 AA 1 (A) of the Municipalities Act 1923 does not deny the Corporation the protection of the law;

   (d) Neither the Amendment Acts, nor the proposed Reform Act, if enacted, contravene Section 13 of the Constitution;

   (e) The Reform Bill, if enacted, will not contravene section 9 of the Constitution.

5. In relation to issue (a) I considered at paragraphs [19] – [74] a number of authorities, and, having done so, I decided, in paragraphs [75] – [105]:

(i) that the Chief Justice was bound by three Court of Appeal cases (*Grape Bay*[1]*, Inchcup*[2] and *Ferguson*[3]*)* to decide that section 1 did not have independent force; and

(ii) that we were bound to follow *Ferguson*, a case in which the Court of Appeal had had to decide whether to follow either *Farias*[4] or *Inchcup* and had decided to follow *Inchcup.*

6. I also decided that the *"protection of the law"* provision in section 1 was not, by itself, directly enforceable: [106] – [115].

7. In relation to issue (c), Section 7AA 1 (A) of the Municipalities Act 1923 provides that any act or thing required to be done, or done, by the Corporation in pursuance of Ministerial directions given under subsection (1) should be deemed to be for municipal purposes and as a function of the Corporation. I decided at paragraphs [117] – [143] that the mere existence of that provision did not offend the rule of law; although particular directions made by the Minister might be held to be unlawful.

8. In relation to issue (d), I determined, at paragraphs [146] – [191], that section 13 (1) of the Constitution was not infringed, because neither the Amendment Acts nor the proposed Reform Act amounted to a transfer of property or property rights to the Government. I considered a number of Privy Council authorities which considered the ambit of "*taking*" of property and concluded that neither the Amendment Acts nor the Reform Act amounted to a taking of possession of the property of the Corporation or the acquisition of an interest in or right over it, whether actually or constructively.

9. As to item (e), I determined at paragraphs [198] – [226] that the proposed Reform Act would not contravene the right of expression under section 9 of the Constitution. We had considered the submission that it would do so *de bene esse*, since it had not been argued before the Chief Justice nor contained in the original Notice of Appeal. In essence the allegation was that the proposed Reform Act interfered with the freedom of expression of electors under section 9. I rejected that contention essentially on the basis that there was no constitutional right to municipal elections and that their abolition would not give rise to any breach of the right to freedom of expression; and that section 9 could not be invoked to mandate democratic elections for municipalities.

The Corporation's submissions

10. The Corporation submits that, although their appeal has failed, there should be no order as to costs, relying on the "*Biowatch/Barbosa principle*", to use the expression adopted by this Court in *Dr Gina Tucker v the Public Service Commission and Board of Education* [2021] CA (Bda) Civ 13,

[1] *Attorney General v Grape Bay Limited* [1998] Bda LR 6.
[2] *Neil Inchcup (trading as Alexis Entertainment and Plush) v Attorney General* [2006] Bda LR 44
[3] *Ferguson v Attorney General* [2019] 1 LRC 673
[4] *Farias v Malpas* [1993] Bda LR 18

referring to the judgments of the South African Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources and others* [2009] 5 LRC 445 and of the Bermuda Court of Appeal in *Minister of Home Affairs and Anr v Barbosa (Costs)* [2017] Bda LR 32.

11. In *Barbos*a Baker P quoted a substantial passage from the judgment of Sachs J in *Biowatch* where that judge had said the following, in relation to cases between private parties and the State:

> *"What the general approach should be in relation to suits between **private parties** and the state*
> *….*
> *[21] In Affordable Medicines this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state **ought not to be ordered to pay costs**. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:*
>
> > *'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the **general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs**. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. **There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs**. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case …"*
> >
> > [Bold added in this as in subsequent paragraphs]

12. Sachs J then cited a passage from *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3 to the effect that there was no inflexible rule that litigants were free to challenge the constitutionality of statutory provisions no matter how spurious the grounds for doing so might be or how remote the possibility that the Court would grant them access. He then continued:

> "[22] *In Affordable Medicines the general rule was applied so as to overturn a costs award that had been given in the High Court against the applicants, the High Court having reasoned in part that the applicants had been largely unsuccessful and that they had appeared to be in a position to pay. Although Ngcobo J in substance rejected the appeal by the medical practitioners on the merits, he overturned the*

order on costs made by the High Court against them, and held that both in the High Court and in this Court each party should bear its own costs. In litigation between the government ***and a private party*** *seeking to assert a constitutional right,* Affordable Medicines *established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.*

[23] The rationale for this general rule is three-fold. In the first place it ***diminishes the chilling effect*** *that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome,* ***might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations****. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there* ***should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure****. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.*

[24] At the same time, however, the general approach of this Court to costs in litigation between ***private parties and the state, is not unqualified.*** *If an application* ***is frivolous or vexatious, or in any other way manifestly inappropriate, t****he applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts* ***should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant*** *in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.*

[25] Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in Affordable Medicines. ***The issues must be genuine and substantive, and truly raise constitutional considerations relevant***

> ***to the adjudication***. *The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future."*

13. In *Holman and Ors v Attorney General (Costs)* [2015] Bda LR 93 Hellman J had said:

> *"…I am satisfied that in an application under section 15 of the Constitution the applicant should not be ordered to pay the respondent's or any third party's costs unless the Court is satisfied that the applicant has acted* ***unreasonably*** *in making the application or in the conduct of the proceedings. Thus if the applicant is unsuccessful each party will normally bear their own costs. However, if the applicant is successful then the respondent will normally be ordered to pay the applicant's costs."*

14. The Court of Appeal adopted Hellman J's statement as a correct statement of the law. Baker P added:

> *"I do, however, sound this note of caution as to its application. The general rule in constitutional cases should not be applied blindly. Individual cases may involve features which justify some departure from the general rule. Often, constitutional issues will be linked with other claims. Sometimes success or failure will be partial rather than total and sometimes as in the present case, there will be an appeal. In the end, the Court has to make a just order according to the facts of the case."*

15. *Barbosa* was considered again in *Tucker*. In that case the appellant had sought a declaration against the respondents that the appointment of Mrs Kalmar Richards as Commissioner of Education for Bermuda was void on the grounds of illegality because of the alleged failures in the appointment process set out at [9] of the judgment. The Court of Appeal expressed itself content to endorse the *Biowatch/ Barbosa* principle but held that it had no application in that case because the appellant's complaint was a purely personal one, alleging only breaches of procedure, and raised no issue of sufficient constitutionality to justify the application of the principle.

16. At [37] of the judgment Smellie J.A. observed that the Court's conclusion on the facts of that case:

> "*does not suggest that a constitutional claim can only be brought under section 15 of the Constitution. As Kawaley CJ (in* ***Minister of Home Affairs v Bermuda Industrial Union*** *[2016] SC (Bda) 4 Civ (15 January 2016) and Hellman J (in* ***Matthie (BPTSA) v Minister of Education and Anor (Costs)*** *both explained, a constitutional claim may be raised in different ways, including within a judicial review application.*

> *38. However, by whatever process raised, a claim in order to attract the protection of the **Biowatch/Barbosa** principle, must involve issues which are "genuine and substantive, and truly raise constitutional considerations which are relevant to the adjudication": **Biowatch**, above, at [25]."*

17. The Corporation submits that this is a case to which the *Biowatch/Barbosa* principle applies and that, for that reason, there should be no order for costs against it. Every aspect of the three-fold rationale expounded in that case applies.

18. As to the first, the appellant is not a state[5] funded organisation. A ruinous adverse costs order in favour of the government and against the Corporation will discourage litigants from bringing constitutional claims forward, however meritorious they may be.

19. As to the second, the case raised complex and fundamentally important issues concerning the state of the law in relation to the independent enforceability of section 1 of the Constitution, which is potentially determinative of the scope of protection afforded by the Constitution to property rights generally. The importance of the matter extends beyond the shores of Bermuda since many other Commonwealth countries have constitutions which contain similar, or even identical, provisions. The case also raises fundamental and important questions on the scope of the application of the property rights conferred by section 12 of the Constitution, the scope of the principle of the rule of law, and the issue of whether a right to vote can be inferred from the right to freedom of expression.

20. As to the third, it is appropriate that the state should bear its costs of a genuine, non- frivolous challenge to the constitutionality of laws or state conduct. The consequence of that is that responsibility for ensuring that the law and the conduct of the state is constitutional is placed at the correct door.

21. In relation to these submissions the Corporation drew attention to the fact that in support of the submission that the Corporation was not a private party the Attorney General had relied on paragraph 126 of the judgment of the Chief Justice where he held (i) that the Corporation was *"a body corporate established by law for public purposes*" and (ii) that "*all funds received by [it]other than commercial investments in the acquisition of property with the Corporation became public funds*".

22. The second holding had, it was said, been overturned by our decision when at [195] – [196] I said:

> *"195. The Corporation also submits that the Chief Justice was wrong to hold that the exception potentially applied because all the monies received by the Corporation, other than the ones he identified, became public funds. The test was not whether the moneys <u>received</u> became public funds but whether the <u>source</u> of*

[5] In the context of Bermuda, the state is the Crown in right of the Government of Bermuda; but it is convenient to refer to "the state", since that is the expression found in the authorities.

> *any funds was other than moneys provided from public funds. There is no evidence that the source of the Corporation's funds is exclusively public, and some of it, such as rentals and car parking fees, is certainly not. The term "public funds" is not defined in section 13 (3) [*of the Constitution*] but, it is submitted, they are to be confined to the sort of "public money" or "public funds" which are covered by sections 36 to 39 of the Constitution. Section 39 (1) defines a "money bill" and provides that, in that subsection:*
>
> > *"the expressions "taxation", "debt", "public money" and "loan" do not include any taxation imposed, debt incurred, money provided or loan raised by any local authority body for local purposes".*
>
> *196. I would accept that the question under section 13 (3) is whether the source of monies invested was from anywhere other than public funds. That begs the question as to what monies are to be taken as having been invested in the Corporation, an expression which would not appear to me to be apt to cover rentals and car parking fees. We do not, however, have the necessary evidence to determine that question."*

23. I do not regard those paragraphs as holding that, with possible exceptions, funds received by the Corporation, once they have been received, are not "*public funds*". Once the Corporation has the money it must only use it for the municipal (and, therefore, public) purposes for which it exists. Such funds are not, however, funds of the Crown/Government.

24. The Corporation contends that the exceptions to the principle do not apply. The case promoted was in no way frivolous, vexatious or manifestly inappropriate. Leading counsel argued it for four days. The resulting judgment is long, wide in scope and extent, and complex.

25. Counsel for the Attorney General was, it was submitted, wrong to submit below, as they do here, that the *Biowatch/Barbosa* principles are inapplicable because the Corporation is not a "private party" within the meaning of the principles. As to that the Corporation advances three submissions.

26. First, the idea that a corporation incorporated by statute for purposes of a public nature should not have the protection of the rule in a meritorious constitutional case simply cannot be right, particularly in the context of Bermuda, where there are many prominent examples of such corporations. Is the Bermuda National Trust for example (incorporated by the Bermuda National Trust Act for purposes which are at least as public as those of the Corporation and with an obvious statutory connection to the government) to be excluded from attempting to protect precious National Trust property donated to it the purposes of preservation from encroachment by a government bent on developing such property?

27. Second, whilst some of the relevant cases refer to a private party - see, for instance the passage from the judgment of Sachs J cited at [11] above - others do not. Thus, in *Affordable Medicines* the rule is stated this:

> "*the general rule in constitutional litigation [is] that **an unsuccessful litigant** ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on **litigants** who might wish to vindicate their constitutional rights".*

And in *Biowatch* the following appears at [24}:

> *"…courts should not lightly turn their backs on the general principle of not awarding costs against an **unsuccessful litigant** in proceedings against the state, where matters of constitutional importance arise".*

And in *Holman* Hellman J's satisfaction was in relation to "*an **application** under section 15 of the Constitution*" that "*the **applicant***" should not be ordered to pay the respondent's costs.

28. Third, it is essential to take into account the context in which the rule in *Biowatch* was formulated. The Court identified the issue as being "*whether the general principles developed by the courts with regard to costs awards need to be modified to meet the exigencies of constitutional litigation*" – the emphasis in that question being on the nature of the litigation not that of the litigant. The court took those principles to be exemplified by *Affordable Medicines* in which the statement of principle is not, on its face, limited in its application to "*private parties*". The first question which the court posed for itself was "*whether costs awards in constitutional litigation should be determined by the status of the parties or the issue*.". The answer which the Court gave to that question was the following:

> "*16 In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice."*

29. In the next paragraph the Court observed:

> *"Courts are obligated to be impartial with regard to litigants who appear before them. Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting*

> *for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution."*

And the Court continued:

> "*18 Thus in Affordable Medicines this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the state should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court."*

30. Thus, the Corporation submits, the purpose of the rule is to ensure that any constitutional litigant against the state, be he, she or it rich or poor, advantaged or disadvantaged, or a statutory corporation with municipal or public purposes, or a municipal corporation, is not discouraged from raising meritorious constitutional issues against the state for fear of an adverse costs order if the litigation is unsuccessful. The primary consideration is the way in which the costs order would hinder or promote the advancement of constitutional justice, the character of the litigation and the conduct of those who have pursued it. There is thus no reason in principle or in practical terms why the rule should not apply to the Corporation.

31. The context also explains why the language of private parties is used. It is to distinguish a state party from any other party. This is consistent with the state action doctrine, which holds that constitutional actions are available only against the state, properly so called, and not against private parties or between private parties. And *Biowatch* itself held at [28] that even in circumstances where private parties become involved to support or resist the position of the constitutional applicant, so that the matter has something of the appearance of a dispute between private parties, the general principle should still apply. The focus is therefore not on who is for, or who is against the state, only that the state is being held to account by someone with a relevant interest. A private party must, therefore simply be a non-state party, which the Corporation is.

32. The Corporation is not an agency of the Crown. The Minister may have considerable control over the Corporation but that does not make the Corporation an agency of the state: see the discussion

by Lord Denning in *Tamlin v Hannaford* [1949] 2 AER 327, cited by Lord Walker in *Attorney General v Smith* [2010] 3 LRC 63, as to the status of the British Transport Commission, a statutory corporation which took over the British railway industry when it was nationalised, and over which the Minister of Transport had very extensive powers. As Lord Denning said:

> *"In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants and its property is not Crown property."*

33. The same applies to the Corporation. Further, the Municipalities Act 1923 clearly treats the Crown as being an entity separate and apart from the Corporation: see, for instance section 22 thereof, which gives the Corporation the powers of the Government in relation to compulsory acquisition under the *Acquisition of Land Act 1920,* and then provides for references therein to "*the Crown*" to be read as references to the Corporation concerned.

The Attorney General's submissions

34. Counsel for the Attorney General contended that costs should follow the event. Reference was made to the passages in *Biowatch* which refer to litigation between private parties and the state or the government: see paragraphs 21, 22 and 24 thereof, cited at [11] – [12] above. Similarly, in *Chief of Police v Nisa* [2008] 73 WIR 201, cited by Hellman J in *Holman* at [14], Rawlins CJ referred to a particular rule as mirroring "*the prior practice of our courts in constitutional cases in relation to* ***a private citizen*** *seeking to enforce constitutional rights".*

35. The Corporation is not a private party within the meaning of the *Biowatch* principle. It is a local government. That it is not a private party was, it was submitted, confirmed by the Chief Justice when he said at [128]:

> *"I accept Mr Howard's submission that the Corporation is a body corporate established by law for public purposes. In my view, municipal purposes, in the present context, are to be equated with public purposes. I also accept, as held by Lord Templeman in the Hazell case, that all funds received by the Corporation, other than third-party commercial investments in the acquisition of property with the Corporation, become public funds."*

36. The distinction between the Corporation and a commercial company was highlighted in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* [2019)] UKPC where the Privy Council said:

> *"16* ***Unlike a commercial company****, the Corporation has no objects clause setting out the purposes for which it was incorporated. Those purposes must be identified by interpreting the enactments which constitute the Corporation. The power to*

> *make ordinances provides important guidance on its functions, as it had in the 1793 Act, quoted above. The 1923 Act confers powers to make ordinances for specific purposes, such as running the port of Hamilton, maintaining highways, regulating markets, controlling the construction of buildings, maintaining the water supply and regulating places of public entertainment".*

37. The Privy Council then went on to set out section 38 of the Municipalities Act 1923 which governed the Corporation's statutory power to make Ordinances. The very nature and purpose of Ordinances and of other powers of the Corporation undermine the argument that it is a private entity, particularly in the sense covered by the *Biowatch* principle. The Attorney General does not suggest that the Corporation is the state or an agent of the state, but that local government is akin to the state for present purposes. The Corporation has itself been referred to as "*the public sector*" by the Supreme Court in *Benevides v Attorney General and the Corporation of Hamilton* [2014] Bda LR 33, para 50. Further, it would not be realistic to suppose that private individuals will be discouraged by the outcome of a dispute between public bodies.

38. Reference was also made to *Member of the Executive Council for the Development Planning and Local Government Gauteng v Democratic Party and Others* (CCT 33/97) [1988] ZACC 9, a decision of the South African Supreme Court in a case in which a member of a local council and the local council sought constitutional relief against the Democratic Party. The Court held the following in relation to coats:

> "[67] *Finally, the appropriate order for costs must be determined. This Court has been reluctant to oblige a party that fails in an effort to challenge the constitutionality of legislation to pay the costs of the successful litigant. This reluctance is motivated by a desire not to discourage litigants from making constitutional challenges which are of potential substance merely because of the fear of the financial consequences of failure. But there is no inviolable rule that the successful litigant ought not to be awarded costs. In this case, the appellant, a member of the executive council of a province who is unlikely to be deterred by a cost order against him, brought the respondents (one of whom is a political party, and the others members of the relevant municipal council) to court, challenging a legislative provision. Before Snyders J, appellant was a co-applicant with the Council. The challenge has failed and there is no reason for the respondents to bear their own costs incurred either before the High Court or before this Court. This would indeed be unfair."*

39. Further, even if the *Biowatch/Barbosa* principle is applicable, the present case falls within exceptions to that principle. As Baker P said in *Tucker* "*the general rule in constitutional cases should not be applied blindly. Individual case may involve features which justify some departure from the general rule"*. That binding statement goes beyond those in *Biowatch*.

40. In particular:

(i) The question as to whether section 1 of the Constitution was independently enforceable had already been determined by three successive Courts of Appeal in Bermuda in the cases of *Grape Bay, Inchcup* and *Ferguson*. The Corporation sought to invite the Court to apply the decision in *Farias v Malpas* despite the Court of Appeal having already made the decision not to do so in *Inchcup* – on the ground that the decision in *Farias* was *per incuriam*.

(ii) The relevant Privy Council and CCJ decisions (e.g. *Campbell Rodrigues, Lewis, Newbold, Nervais and Jamaicans for Justice*) were all before the Court of Appeal in *Ferguson*, and a ruling was given on the independent enforceability of section 1 (i.e. that there was none). No further analysis was needed. There was no proper basis upon which the Chief Justice could be said to have erred in law in holding that he was bound by three successive decisions of the Court of Appeal. The suggestion that the Court of Appeal should overturn three successive cases (*Grape Bay, Inchcup* and *Ferguson*) in favour of *Farias*, which the Court of Appeal had already rejected in *Inchcup* and *Ferguson* was, at the lowest, unreasonable.

(iii) The suggestion that, even if section 1 could not have independent force, the "protection of law" provision within section1 (a) could do so was wholly unsustainable.

(iv) The only reason why section 1 and the protection of law arguments were adduced was in order to challenge section 7AA (1A) on the basis that it infringed the rule of law for the Minister to have power to issue such directions. But even if section 1 or the protection of law provision therein were independently enforceable the Court of Appeal would still have to be persuaded that section 7AA (1A) of the Municipalities Act 1923 *per se* infringed the rule of law. But that argument was without merit because:

(a) as the Court recognised, it has long been established that the protection of the law "*does not extend to giving the courts the power to… strike down legislative provisions which are not inconsistent with sections 2-13 of the Constitution"*: see [116] of the judgment citing *Bahamas District Council of the Methodist Church in the Caribbean and the Americas v Symonett and Others* [2000] UKPC 31. So even if section 1 was, in whole or in part, independently enforceable, it could not have applied to give the Corporation relief in the present case; and

(b) the argument in respect of section 7AA (1A) was premature because the availability of relief could not be assessed in the absence of any actual direction which was sought to be impugned. The court pointed this out in paragraphs [141] – [1433 of my judgment where I said:

> "[*141] There is no need for us to declare that 7 AA 1 (A) does not permit the Minister to do anything which offends the Constitution.*

> *That is (a) obvious and (b) accepted. Nor, absent an actual direction, can (or should) we address the myriad of circumstances in which a particular direction might be said to be unconstitutional, or its making a contravention of common law duties or restrictions, or the range of defences, both under the Constitution and at common law, which might be put forward.*
>
> *142. So far as the protection of the law afforded by the common law is concerned, the Corporation has it, since it may challenge any direction that the Minister may be minded to give, by way of judicial review on common law principles or on the ground that it offends the Constitution. Section 7 AA 1 (A) does not, per se and without more, infringe the rule of law, whereas a particular direction given thereunder might do so.*
>
> *143. In those circumstances it is not necessary to decide whether, if the Corporation was right that it was entitled, under the common law, but not by way of a constitutional right, to the protection of law and that such protection rendered section 7AA (1A) void or unenforceable, then any application for relief (a) had to be brought by way of judicial review, for which leave would be required; and (b) did not fall to be dealt with because no leave had ever been sought nor had the point been raised below (the application before the Chief Justice being under section 15 of the Constitution); and/or (c) should not be dealt with because the application was out of time"*

(v) The section 7AA (1A) point was not raised before the Chief Justice and was not in the Notice of Appeal. It appeared for the first time in the Corporation's skeleton argument for the Court of Appeal. Even then it was not clear what exactly was being contended, which was only clarified on day 1 of the hearing, as a result of which the respondents were given leave to file an additional skeleton argument.

41. Lastly, the rule of law argument that was based on the common law, and was made in the alternative to the section 1 protection of law argument, is not properly to be regarded as a constitutional application; and the *Biowatch* principle does not apply in relation to that aspect of the appeal at all.

42. In short, the section 1and the common law protection of law arguments were wholly misconceived, raised no new point that was relevant to the relief sought and were unnecessarily and unreasonably bought.

43. In any event the section 9 argument was improperly brought and wholly misconceived in substance. It was not argued before the Chief Justice; nor was it set out in the Notice of Appeal. It was raised for the first time in the Corporation's skeleton argument. The detail in that argument

was woefully inadequate to the extent that it was not clear whose rights of freedom of expression were said to have been infringed. It was only on day 1, after pressure from the President, that it was suggested that the freedom was that of the electors. Further the primary issue was that of the motive behind the relevant legislation which required evidence.

44. Before the commencement of the hearing the respondents had prepared specific written submissions to oppose the application to argue the section 9 point (as it was then being made) on the ground that the Corporation lacked standing and because evidence was required. Given the change on day 1 (to the standing being that of the electors) and on day 3 (when motive was abandoned: - see [201] of the judgment), these costs were wholly wasted. The Corporation was also required to file a further skeleton argument bringing the total to four; 1 main skeleton and 3 skeleton arguments directly responsible to changes of position by the Corporation.

45. Next, it became apparent as the argument proceeded, that the contentions of the Corporation were entirely inconsistent with the concession in its skeleton that there was no constitutional right to local government or to a vote in local elections. Had the Corporation properly considered that concession it would have been clear that the argument based on freed of expression was hopeless. As I said in the judgment:

> *"214 If, therefore, there is no constitutional right to municipal elections and, if the Council was presently appointed by some non-electoral means, it does not seem to me that the residents or business ratepayers could claim a right to municipal elections on the grounds that otherwise their freedom of expression would be hindered.*
>
> *215. But there is, of course, and has been for many years, a democratically elected Council. I do not, however, find it possible to reconcile the acceptance by the Corporation that there is no constitutional right to a democratic election for the Corporation with the proposition that an enactment of the Legislature that abolishes the democratic vote is constitutionally invalid because it contravenes the right of the electors to freedom of expression."*

46. Further the section 9 argument was in effect a failed application to adduce a new point on appeal. The Court heard the section 9 argument *de bene esse*, but it is clear from the judgment that evidence was required as appears from the following paragraphs:

47. In those circumstances the respondents should get the entirety of their costs attributable to the section 9 aspect of the appeal.

48. In short, the section 1, common law protection of law and section 9 arguments were unreasonably brought, were frivolous and vexatious as they wholly lacked merit, and had either already been determined by the Court of Appeal or could not have been due to their being premature. It would be unjust for the respondents to bear their own costs in respect of the unmeritorious points taken

by the Corporation. Accordingly, the respondents ask for 75% of their costs, the 25% not claimed being in respect of the deprivation of property argument.

The Corporation's submissions in reply

49. The submissions on behalf of the Attorney General do not, it is said, provide any real answer to the Corporation's initial submissions. The fact that the Corporation is a municipality rather than some other kind of public body does not advance the argument that was made by the Attorney General below by reference to the case of *Limpopo Legal solutions and Others v Vhembe District Municipality and Others* (CCT!59-16) ZASCA 96.

50. In that case a non-profit organisation and certain individual applicants sought to pursue constitutional rights. The area in which the applicants lived had been subject to the escape of noxious sewage. The first respondent was a municipality; the second was the Minister of Environmental affairs; the third respondent was another municipality (Thulamela). The applicants had sought a final interdict directing all or any of the respondents immediately to dispatch a team of contractors to fix a burst sewage pipeline. Vhembe Municipality vigorously opposed the application, contending that it had only become aware of the problem when the applicants served their urgent application on it; and that, in any event, the applicants did not meet the requirements for an interdict because they had alternative remedies available, most obviously the remedy of reporting the problem to their ward councillor or to the local authority. The applicants did not dispute that they had not informed Vhembe nor the ward councillor of the problem before launching their urgent application. They said that they did not know that the problem was the responsibility of Thulamela and not Vhembe. The individual applicants had in fact reported the problem to Thulamela but to no effect. They had not been directed to apply to Vhembe. Thulamela told them that a team would be despatched to look at the problem, which, however, remained unfixed. The noxious sewage spillage continued.

51. The High Court dismissed the application and ordered each of the applicants, organisational and individual, to pay Vhembe's costs, jointly and severally, on the attorney and client scale. The Constitutional Court of South Africa allowed the appeal and determined that the costs order in the High Court should be that there was no order as to costs. It did so applying *Biowatch* principles. The Supreme Court decided that the High Court had wrongly followed the route as to costs applicable to non-constitutional cases. It held that an adverse costs order was inappropriate. and a punitive order even more so.

52. Counsel for the Attorney General relies on this case because, in the language of the Court, the principle which the High Court had failed to apply was the principle applicable in "*constitutional litigation between a private party and the state- and the general rule is that a private party who is substantially successful should have its costs paid by the state – but no costs order should be made if* ***the state*** *wins*". In other words, it treated the Vhembe municipality as, or as if it was, the state.

53. This argument is fallacious. First the Constitution of South Africa makes it clear that a municipal government is part of the apparatus of overall national executive government. Sections 40 (1) and 151 (1) of that Constitution provide respectively:

> *"In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated".*
>
> *"The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic".*

54. Further, under South Africa's constitutional arrangements, where a municipality litigates against central government in a constitutional case, the municipality is treated as a private party. Thus in *King Sabata Dalinindyebo Municipality v Kwalindile Communit*y [2012] ZASCZ 96, the case involved (i) a municipality; (ii) persons who were undoubtedly private (corporate) parties, (iii) three communities; (iv) a Minister, and (v) a regional commissioner. As between the municipality and the (unsuccessful) private parties *Biowatch* was applied to protect the latter against any adverse costs award; but, as between the municipality and the regional commissioner *"representing the state*", the municipality, which was described as a government body but with a budget vote separate from that of the relevant department was, "*to be equated with a private litigant who achieved success against a government body"* and was entitled to its costs.

55. In support of their contention that it would be anathema to the purpose of the *Biowatch* principle to extend such protection to local government entities, counsel for the Attorney General cited *Democratic Alliance v Minster of International Relations* [2017] 5 LRC 69 at [82]. That case concerned the largest minority party in the South African Parliament. Under its constitution it was a "*body corporate with perpetual succession*"; and had public purposes namely "*to register for and participate in elections and in political activities in the national, provincial and local spheres of government in the Republic of South Africa"* (clause 1.12) in order to promote certain public objectives including "*the supremacy of the South African Constitution and the rule of law"* (clause 1.3.3),"*being an effective government when in power*" (clause 1.4.2.3) and "*being an effective opposition when not in government*". The party was treated as a private party for the purposes of the *Biowatc*h principle in constitutional litigation where a Minister of the State was the respondent.

56. In the paragraph cited [82] the court said:

> "*The general principles with regard to costs in constitutional litigation were laid down by the Constitutional Court in Affordable Medicines and Biowatch, Relevant to the present case is that in constitutional litigation between a private party and the state, if the private party it successful it should have its costs paid by the state, while if unsuccessful each party should pay its own costs. The DA has been successful. It is entitled to its costs from* ***government*** *respondents, However, costs of three counsel are not warranted. Costs of two should suffice",*

57. The Corporation contends that this is an example of the court treating a "*plainly governmental organisatio*n" as a private party. I disagree. The members of a political party may well seek to become members of a government but I fail to see how a political party is, itself, a governmental organisation. Nor is that apparent from the passage referred to where the court distinguished between the DA and the "*government respondents*".

58. Insofar as reliance is placed on the *Members of the Executive Council* case, the Corporation makes the point that that case was decided 11 years before *Biowatch*, and the case itself referred to the even earlier case of *Motsepe v Commissioner for Inland Revenue [*1997] (2) SA 898 (CC). Further, at the time when the question of costs fell to be determined, only a private individual was before the court because the executive council had dropped out. So, any analogy with the present case is, to say the least, imperfect. Further the judgment does not specify the reason why the member would not be deterred. If it was because he was perceived as having the necessary resources, that is a factor explicitly discounted in *Biowatch*. Even if that was not so, a municipal council may be much more apprehensive about initiating litigation than a very rich individual might be.

59. Importantly, there is a reason why the fact that the case was decided well before *Biowatch* is of particular importance. Before *Biowatch* there was debate over the relationship between traditional costs principles and the growing body of practice in the South African courts of applying special costs principles in constitutional cases, which had until then been applied on *ad hoc* basis. What was unclear was whether the special constitutional principles were simply a factor to be taken into account or a starting point for the exercise of a discretion requiring justification for departure from it. *Biowatch* resolved the issue. The constitutional costs principles, as applied in South Africa, are in fact a rule - in the sense that failure to follow them justifies interference with a first instance decision and departure from the rule is only allowed in certain circumstances namely where the case is frivolous, vexatious or manifestly inappropriate.[6]

60. Further still, *Biowatch* clarified that the focus was not on the identity of the party who is litigating against the state but on the nature of the litigation and the need to combat the chilling effect of traditional costs principles if applied to constitutional litigation.

61. The Corporation also contends that the Attorney General has given no answer to certain points which the Corporation addressed in its submission at first instance.

62. The first point was that the respondents had failed to follow the procedure laid down by the Chief Justice in paragraph 35 of *Sannapareddy v Commissioner of Bermuda Police Service & Attorney General* (Costs) [2017] Bda LR 77, where he said:

[6] See the article by Professor Tracy Humby, *Reflections on the Biowatch dispute – Reviewing the fundamental rules on costs in light of the needs of constitutional and/or public interest litigation* (2009) PER; and the article by the same author *Analysis: The Biowatch case: Major Advance in South African Law of Costs and Access to Environmental Justice* Journal of Environmental Law (2010) 22 (1):125.

> "*35 Going forward, however, if the Attorney-General is either joined or chooses to intervene in a constitutional application and wishes to obtain the extraordinary remedy of an adverse costs order, the applicant must be put on notice from the earliest point possible that he is exposed to such a costs risk. Having regard to the duty of parties to assist the Court to achieve the overriding objective, where the Crown wishes to recover its costs from a constitutional application it contends is wholly unmeritorious at the end of the substantive hearing, steps along the following lines should be taken as a general rule:*
>
> *(1) a letter should be written to the applicant warning that if the unmeritorious application is not withdrawn an application will be made to the Court for the offending portion of the application to be summarily dismissed;*
>
> *(2) if the constitutional application the Crown contends is unmeritorious is not withdrawn, an application should be made before the main hearing for it to be summarily dismissed;*
>
> *(3) on the hearing of any such application, the Court should either:*
>
> *(a) summarily dismiss the application;*
>
> *(b) permit the application to go forward on the basis that it is not wholly unmeritorious and that the usual constitutional costs rule will apply (assuming that the application is not pursued thereafter in an unreasonable manner); or*
>
> *(c) permit the application to go forward on the basis that costs will follow the event if the Court's provisional view that the complaint is frivolous is confirmed after a full hearing."*

63. The second unanswered point is that the case satisfies every aspect of the three-fold rationale of *Biowatch*.

64. Lastly no answer is given to (a) the context in which *Biowatch* was decided, namely that the question in *Biowatch* was "*whether the general principles developed by the courts with regard to costs awards needed to be modified to meet the exigencies of constitutional litigation*" and that the emphasis was as to the nature of the litigation, not the identity or nature of the litigant; (b) the fact that the Corporation is not an organ of the state; (c) the Corporation's explanation of the *Limpop*o case; and (d) the *King Sabata* case.

65. The Corporation disputes the proposition that the *Biowatch* principles - that the constitutional case must be shown to be "*frivolous, vexatious or manifestly inappropriate"* for a costs order to be made - do not apply in Bermuda where the ambit of the exception is wider. In paragraph 13 of the submissions made below the respondents accepted that the exceptions to the *Biowatch* principles in Bermuda were as set out in *Biowatch* itself. The language in *Barbosa* which is relied on consists of altogether unsurprising statements that the general rule should not be applied blindly, that individual cases may involve features which may justify departure from the rule and that in the end the Court must make a just order on the facts.

66. The short answer to this contention is that the judgment in *Tucker* evinces no hint of an intention to move away from the strictness of the exception to the *Biowatc*h principles. In that case the court began its analysis of the issue at paragraph 10 as follows:

> "*10 We begin with the recognition that this principle relates to non-frivolous actions of sufficient constitutional character or public importance to justify protecting an unsuccessful applicant against an adversarial award of costs in favour of the state. Such an action may invoke directly or indirectly, a constitutional right or remedy of personal or public interest*"

67. That statement of the principle which is being recognized presupposes that the exception relates to frivolous actions. There then follows a detailed analysis of the *Biowatch* principle at [16] where it is said:

> "*16 It was in that context that he came in the judgment on behalf of the Constitutional Court to recognize principles which, as in Barbosa (above), we are content once again to endorse and apply by way of the following summary".*

68. Paragraphs 17 to 20 of the judgment of Smellie, JA then set out the principles and exceptions which the Court was "*content. to endorse and apply*". These included the following:

> *"19 The general rule was however, confirmed not to be unqualified or without exception, for example (at [24]):*
>
> > *"If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award".*
>
> *20. And while at [24], it is reminded that "courts should not lightly turn their backs on the general approach" at [25], importantly also and in our view applicable to the present application, that "Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough to itself invoke the general*

> *rule….The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication."*

69. Paragraph 19 of *Tucker* clearly shows that the Court of Appeal in its latest decision on this issue has adopted not just the *Biowatch* principles but also the *Biowatch* exceptions. So does the procedure laid down by the Chief Justice in *Sannapareddy*,

70. In this connection it is useful to set out what was said in *Lawyers for Human Rights v Minister in the Presidency and Others* (CCT120-16) {2016] ZACC:

> *"[18] This, of course, does not mean risk-free constitutional litigation. The Court, in its discretion, might order costs, Biowatch said, if the constitutional grounds of attack are frivolous or vexatious – or* ***if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs.*** *The High Court controls its process. It does so with a measure of flexibility. So a court must consider the "character of the litigation and [the litigant's] conduct in pursuit of it", even where the litigant seeks to assert constitutional rights.*
>
> *[19]* ***What is "vexatious****"? In Bisset the Court said this was litigation that was "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant".* ***And a frivolous*** *complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.*
>
> *[20] Whether an application is* ***manifestly inappropriate*** *depends on whether the application was so unreasonable or out of line that it constitutes an* ***abuse of the process*** *of court. In Beinash, Mahomed CJ stated there could not be an all-encompassing definition of "abuse of process" but that it could be said in general terms "that an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective".* ***[23]*** *The Court held:*
>
> > *"There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in Hudson v Hudson and Another* ***1927 AD 259*** *at 268:*

> *'When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'*
>
> *What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."**[24]***
>
> *[21] Ultimately the inquiry on the appropriateness of the proceedings requires a close and careful examination of all the circumstances. This is what we have to do here. The considerations include the period of the delay between the raids and the application, the reasons for bringing the application and the prejudice, if any, the urgent proceedings caused the respondents."*

Nothing in this case, the Corporation submits, descends to that level.

The application of the exceptions

71. The complexity and comprehensive character of the judgment that responded to the Corporation's submission is itself indicative of the fact that the points made were not of the kind that the exceptions were intended to capture.

72. As to the section 1 point, the respondents say that there was no proper basis upon which the Chief Justice could be said to have erred in holding that he was bound by three successive Court of Appeal decisions that section 1 was not independently enforceable. That is not, however, the test. In any event the issue for the Court of Appeal was whether it was bound in the same way. Moreover, the Privy Council is not bound; and it would have been well-nigh impossible to put the point before the Board without the Board having before it the views of the lower courts.

73. In any event it is impossible to say that the arguments made were frivolous vexatious or unreasonable. It was – perfectly reasonably – argued that *Grape Bay* was not binding, given that it was decided on a different ground in the Privy Council, relying on two authorities of the English Court of Appeal; and that *Inchcup* was not binding, given that the ruling in relation to section 1 was not necessary for the decision. In relation to *Ferguson* it was argued that that case was, itself, unreasoned in that the point was dealt with in passing at the end of the judgment and the case did no more than express the view that the Court was bound by *Inchcup* which, the Corporation argued, was not in fact binding. If it was arguable that *Inchcup* was not binding a statement made on the point in simple reliance on *Inchcup* could reasonably be questioned.

74. Further, there were Privy Council decisions which, at the very least, arguably went the other way[7] and a CCJ decision (*Nervais*[8]) which clearly did so. Indeed, in paragraph [76] of his judgment the Chief Justice had observed that he could see that "*a case can be made as to why the Bermuda courts should adopt a more expansive interpretation of section 1 for the reasons given by the CCJ in the Nervais case*" and the then Chief Justice Kawaley at first instance in *Ferguson* had described the point as "*seriously arguable*" [107]. It took the Court of Appeal 24 pages of closely reasoned text to analyse these arguments and the Chief Justice 17 pages. No one could reasonably say that the point could not be clearer, as the respondents now assert. Further the fact that the process required by *Sannapareddy* was never followed speaks for itself.

75. The other points made by the respondents were not well founded. The argument that the right to the protection of law could be enforceable, even if the rest of section 1 was not, was not wholly unsustainable. The argument was based on four Privy Council authorities, which took up 12 pages of the judgment of the Chief Justice, and four pages of the judgment of the Court of Appeal, simply to express agreement with the Chief Justice. At [79] the Chief Justice had accepted that the position was not clear.

76. The respondents say at [23] of their submissions that even assuming that the protection of law was a constitutional as opposed to a common law right the argument that the impugned provisions were in conflict with it had no merit. They then rely on a number of matters in support.

77. The first – in [24] - is that the protection of the law does not extend to giving the courts the power to strike down legislative provisions which are not inconsistent with sections 2-13 of the Constitution. Reference is made to [116] of my judgment. But what that paragraph held was that the common law protection of law does not enable the Court to strike down legislative provisions. The result could be quite different if section 1 of the Constitution was enforceable. If it was, the Court would have power to strike down legislation inconsistent with section 1: see *Williams v Supervisory Authority* [2020] UKPC 15. In that case the Privy Council proceeded on the basis stated by the Court of Appeal that "*no law should be immeasurable, arbitrary or oppressive*." The Privy Council then proceeded to measure the legislation in question against that principle, applying the following approach [87]:

> "*In the Board's view, the question of compliance with these provisions can be addressed by asking whether the application of the combined regime is proportionate to protect a legitimate public interest, so as to strike a fair balance between the rights of the individual and the interest of the general community. In that regard, appropriate respect should be given to the assessment made by the legislature, which should be afforded a margin of appreciation".*

[7] *Campbell-Rodriques v Attorney General* [2008] 4 LRC 562 & *Newbold v Commissioner of Police & Ors* [2014] 4 LRC 684

[8] *Nervais v The Queen* [2018] CCJ 19

78. In [25] the respondents assert that the section 7 AA (1A) argument was premature and refer to what I said at [141] – [143]. The basis on which those passages proceed is that the possibility that the Corporation could approach the Court to question any particular direction by the Minister secures the protection of law, as was stated by Lord Diplock in *Attorney General of Trinidad & Tobago v McLeod* [1984] UKPC 2 to which I referred at [115] of the judgment. But, it is submitted, it is at least arguable that *McLeod* had been overtaken by later cases such as *Lewis, Newbold, Joseph, Seepersad* and *Maharaj.*

79. In para [26] of their submissions the respondents contend that the section 7 AA (1A) point was not brought before the Chief Justice and was not in the notice of appeal., and that it was not clear what was being contended. In fact, the Corporation's attorneys wrote a letter dated 21 October 2021 to the respondents' attorneys in an effort to ensure that what was being argued was clear. The relevant passages are the following:

> "*The arguments in relation to section 1 and the protection of law*
>
> 2 A*s you will be aware from our Skeleton Submissions, we are proceeding with the argument that section 1 of the Constitution is independently enforceable, both in relation to the right not to be deprived of property without compensation and in relation to the right to the protection of the law.*
>
> *3 Although we continue to take the position that the right to protection of law conferred by section 1 is capable of applying in relation to legislative enactments, we will not be proceeding with the argument that such contravention may occur by reason of the failure to consult, properly or at all, in relation to the policy being implemented by the enactment; nor are we proceeding with the argument that such contravention may occur on the basis that the enactment is judged to be irrational, unreasonable, fundamentally unfair or arbitrary.*
>
> *4 As you will have seen from our Skeleton Submissions, we do however argue that insofar as a legislative enactment seeks to permit a statutory body with limited powers to define the scope of its own powers, such enactment contravenes the rule of law, which is included in the right to protection of the law, and in any event also inheres in the structure of the Constitution. Thus, we say, the combined effects of the provisions of the 2015 and 2018 Amendment Acts, which is that the Minister is empowered to give mandatory and binding directions to the Corporation which are "deemed to be for municipal purposes…. and a function of the Corporation" is in contravention of the rule of law as conferred either by the protection of law right or as inherent in the structure of the Constitution."*

80. In paragraph [27] the respondents submit that the rule of law argument based on the common law is not properly to be regarded as a constitutional application. But what was argued was that the rule of law was implied in the Constitution: see paragraph [5] of the decision of the Chief Justice referred to at [6] of my judgment.

81. In relation to the freedom of expression claim, this was neither, as the respondents allege, "*improperly brought in form [nor] wholly misconceived in substance*". As to the former, an application was made to the court in accordance with the appropriate procedures and based on good authority and in good time. The Corporation's attorney's letter of 7 October 2021 attached the required summons and the Supplemental Notice of Appeal with a view to having the question as to whether the section 9 point could be raised determined on an interlocutory basis prior to the substantive hearing. The point had been raised in the appellant's submissions dated 20 August 2021 and responded to by the respondents in their Skeleton Submissions dated 17 September 2021 at paragraphs 115 to 127. The Court did not respond to the application to address the point before the hearing and instead heard the argument *de bene esse*. The fact that the Court adopted that approach does not constitute any error of procedure on the part of the Corporation.

82. Nor was the point misconceived in substance because of a concession that there was no right to local government, given the case law to the effect that freedom of expression is a free-standing and not a parasitic right (as my judgment recognised at [211]) and is not therefore reliant on other rights, such as a right to local government. The fact that the Court of Appeal ruled as it did does not make the point frivolous, vexatious or manifestly inappropriate or even unreasonable. Given the freestanding nature of the right there is clearly room for reasonable argument. That is not the sort of situation that merits the opprobrium which the respondents seek to heap upon it.

83. Accordingly, the Corporation submits, the *Biowatch* principles apply, the exceptions are as set out in that case, and those exceptions do not apply either. Nothing in the respondents' submissions constitutes the sort of carefully articulated and convincing reason to depart form the principles or to place this case within any of the exceptions.

Conclusions

84. I have set out the submissions of the parties at some length, not least because their breadth and content is, itself, relevant as to whether the *Biowatch* principle applies and whether any exception is applicable. I can, however, express my conclusions rather more shortly.

85. I am entirely satisfied that this is a constitutional case to which the *Biowatch* principles apply. It directly concerns the application, or non-application, of sections 1, 9 and 13 of the Constitution. A small part of it concerned the common law principle of the rule of law. But that part was of such limited compass, and so closely connected to the indisputably constitutional questions, that it seems to me wholly inappropriate to carve out of any costs order a special provision for the common law aspect of the case. Such costs would be difficult to identify and very modest.

86. I am also satisfied that, in the light of the *Biowatch* decision, the Corporation is a body which is entitled to the benefit of the principles laid down in that case. The Corporation is not part of the state or, more accurately, an emanation of the Crown or of the Government of Bermuda. It is a statutory corporation with public functions. But that does not, in my view, mean that the *Biowatch* principles do not apply to it. As that decision confirms, the application of those principles is not dependent on the wealth or status of the non-state party but on the nature of the issues. Here the issues are plainly constitutional and the questions which the case raises are of wide public importance, extending beyond the immediate parties to the action, and affecting the electors and taxpayers of Hamilton, the wider public, the Corporation of St George's and no doubt others.

87. I am also satisfied that the application of the *Biowatch* principles is appropriate in order not to discourage the making of constitutional applications. The Corporation of Hamilton could, no doubt, afford the payment of the costs of the respondents, but those costs are probably significant (a four-day hearing with leading counsel does not usually come cheap). Payment of them would reduce the sum available for municipal purposes, and, ultimately be borne by the taxpayers. The fact that the Corporation had to bear them would be a disincentive to any further invocation of constitutional rights by the Corporation; and would also be a disincentive to others, both individual and corporate, to launch constitutional claims in future.

88. I am also satisfied that the initiation and conduct of this litigation was neither frivolous, vexatious, manifestly inappropriate or, in any way, an abuse of the process of the Court. These were the characterisations of the exception to the principle laid down in *Biowatch* and I would regard them as the applicable exceptions, subject to two observations.

89. The first is that these are not the words of a statute, or even of a case that is binding upon us. As Baker P observed in words which I would repeat and adopt:

> *"the general rule in constitutional cases should not be applied blindly. Individual cases may involve features which justify some departure from the general rule".*

90. One example that springs to mind is a case which is neither frivolous or vexatious but is one in which the constitutional litigant or his advisers fail to comply with the ordinary rules of procedure in a particularly egregious way which causes the state litigant to have to undertake wholly unnecessary expenditure.

91. The second is that the formulation of the exceptions does not include the circumstance that the litigant has acted "unreasonably". Conduct that falls within the exceptions as formulated will almost certainly be unreasonable. But that which can be characterised as unreasonable does not necessarily come within the formulation. The type of unreasonableness which should be regarded as coming within the exception to the general rule, should, generally speaking, be of such a character as brings it within the exceptions as formulated.

92. As to the inapplicability of the exceptions, this was a case in which the Court received submissions of high quality (on both sides) from distinguished counsel which it has addressed in a lengthy judgment. In it we have addressed authorities from a number of jurisdictions in what is a not entirely clearly charted sea. Whilst we have reached a clear and unanimous decision, this does not mean that the result was self-evident or that the points argued on behalf of the Corporation were, in truth, not realistically arguable. Further, whilst the fact that the case is to be considered by the Privy Council is in no way determinative on the issue of costs (because the Corporation has an appeal as of right), it seems to me that the issues in this case are fit for consideration by the Board, which, relieved of the burden of precedent, might take a different view.

93. This was emphatically not a case where the invocation of constitutional rights was unnecessary or unconvincing, or where a litigant has persistently asserted untenable claims, or is clearly abusing the system by using it for some improper purpose. On the contrary, I am of the view that the points made on behalf of the Corporation which I have summarised in paragraphs [69] – [81] above, are such as to neuter the sting of the allegations of misconduct falling within the exceptions which are made against it. I also take into account that no attempt was made to comply with the *Sanapareddy* procedure, helpfully laid down by the Chief Justice.

94. Accordingly, I would order, in relation to the costs of the appeal to us, that there should be no order as to costs.

BELL J.A.

95. I agree

GLOSTER J.A.

96. I also agree.