Vellama d/o Marie Muthu *v* Attorney-General
[2012] SGHC 221

Case Number : Originating Summons No 196 of 2012/G

Decision Date : 01 November 2012

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : M Ravi (L.F. Violet Netto) for the Applicant; David Chong SC, Low Siew Ling, Lim Sai Nei (Attorney-General's Chambers) for the Respondent.

Parties : Vellama d/o Marie Muthu — Attorney-General

Civil procedure – costs

Administrative Law – Judicial review – costs

1 November 2012 Judgment reserved.

Philip Pillai J:

Introduction

1 The judgment on the judicial review application in Originating Summons No 196 of 2012 ("OS 196") ("the Substantive Application") and the Applicant's reserved application for two declarations ("the Reserved Application") was released on 1 August 2012: *Vellama d/o Marie Muthu v Attorney-General* [2012] SGHC 155 ("the Final Judgment"). At the initial hearing for leave to proceed with the judicial review application ("the Leave Application"), neither counsel made any submissions on costs and none were then ordered. After the Final Judgment was delivered, both counsel made their submissions on the costs of all the above applications. The following is my judgment on the costs of all these applications.

Background

2 On 28 February 2012 the Speaker of Parliament announced that the elected Member of Parliament seat in Hougang Single Member Constituency ("Hougang SMC") had become vacant under Art 46(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution").

3 On 2 March 2012 the Applicant filed OS 196 seeking a Mandatory Order and two declarations under O 53 r 1(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC"). The Mandatory Order sought was to enjoin the Prime Minister to advise the President to issue a writ of election for a by-election in Hougang SMC pursuant to Art 49(1) of the Constitution and to tender such advice within three months or within such reasonable time as the court deemed fit. The declarations were to declare that the Prime Minister does not have unfettered discretion in deciding whether to announce a by-election in Hougang SMC and that he must decide within three months or within such reasonable time as the court deemed fit. The Applicant filed her Statement pursuant to O 53 r 1(2) on 4 March 2012 ("the Statement").

4 On 9 March 2012, the Prime Minister announced in Parliament that he intended to call a by-

election in Hougang SMC but that he had not decided on the timing. He would decide on the timing after taking into account all relevant factors including local, national and international factors: see *Singapore Parliamentary Debates, Official Report* (9 March 2012) vol 88 at col 5.

5 On 3 April 2012, leave was granted to the Applicant to proceed with the Substantive Application. The grounds of decision to grant leave were set out in *Vellama d/o Marie Muthu v Attorney-General* [2012] 2 SLR 1033 ("the Leave Judgment").

6 On 9 May 2012, the writ of election calling for a by-election in Hougang SMC was issued by the President, upon the advice of the Prime Minister. The by-election was held on 26 May 2012.

7 After leave was granted, the Attorney-General ("AG") appealed to the Court of Appeal on 4 April 2012 against the decision to grant leave. Following the issue of the writ of election on 16 May 2012, the AG withdrew the appeal.

8 On 29 May 2012, the Applicant proceeded with the Substantive Application by filing Summons No 2639 of 2012 ("SUM 2639"). This was followed by a series of interlocutory applications ("the Interlocutory Applications") by both parties:

(a) Summons No 2684 of 2012 ("SUM 2684") filed by the AG on 31 May 2012, to strike out SUM 2639 and seek a permanent stay on the Leave Application which had been granted;

(b) Summons No 2711 of 2012 ("SUM 2711") filed by the Applicant on 1 June 2012 to subpoena and cross-examine the Prime Minister and to obtain discovery of the AG's advice to the Prime Minister;

(c) Summons No 3296 of 2012 ("SUM 3296") filed by the Applicant on 2 July 2012 to amend SUM 2639; and

(d) Summons No 3297 of 2012 ("SUM 3297") filed by the Applicant on 2 July 2012 to amend the Statement.

9 On 5 July 2012, the four summonses above were heard. The AG's SUM 2684 was dismissed. The Applicant's SUM 2711 and SUM 3296 were dismissed. Leave was granted for the Applicant to withdraw her SUM 3297.

10 The Substantive Application and Reserved Application were heard in open court on 16 July 2012. At the hearing, the Applicant abandoned her application for the Mandatory Order. Thus, the relief sought for the Substantive Application was confined to the O 53 declarations. The court determined that it had no power under O 53 to grant standalone declarations where the principal application for a Mandatory Order which included the declarations failed. The court therefore held that the application for the declarations as part of an O 53 judicial review application failed: see the Final Judgment at [31]–[35].

11 As the Reserved Application did not require the leave of court to proceed, in order to avoid multiplicity of proceedings, both parties were heard on the merits of the Reserved Application. The Reserved Application was also dismissed on the principal ground that the Constitution does not require the Prime Minister to call a by-election and that it was within his discretion whether, and if so, when to call a by-election. Costs were to be determined at a later date.

Parties' proposals and submissions on costs

Costs for the four summonses

12 Both counsel were heard on costs on 16 October 2012. Both counsel took the position that there should be no order as to costs for the Interlocutory Applications, namely SUM 2684, SUM 2711, SUM 3296 and SUM 3297.

Costs for the Leave Application

13 The AG's counsel submitted that the costs for the Leave Application should now be determined to be costs in the cause. He further submitted that as the ultimately successful party the AG should be awarded total costs of $10,000 (inclusive of disbursements).

14 The Applicant's counsel submitted that as the Applicant had been successful in the Leave Application, she should now be awarded costs for that application. In the light of this, he proposed that the AG's costs as the ultimately successful party be set off against the Applicant's costs for her successful Leave Application. He further proposed that these respective costs be taxed and any resulting difference be payable to the party awarded the higher costs. The AG's counsel rejected his proposal.

15 At this juncture, it is apposite to note that whilst O 53 r 1(4) anticipates costs orders at the leave stage, neither counsel had raised or made any submissions for costs and accordingly no costs order was made for the Leave Application at that time.

16 I am unable to accept the AG's counsel's submission that costs in the cause should now be ordered for the Leave Application. Before costs in the cause can be ordered, the outcome of the cause must necessarily be unknown. I am also unable to accept the Applicant's counsel's submission that costs should now be awarded to the Applicant for her successful Leave Application. Once leave was granted and before the Final Judgment was released, it was open to the Applicant's counsel to ask either for costs, costs in any event, costs in the cause *etc*. However, that was not done.

17 An impartial and fair determination of costs for the Leave Application is to be made in consideration of all the submissions of counsel and based on the circumstances prevailing at that material time. This cannot be safely made now because of the overhang of the now known Final Judgment.

18 For the above reasons, I decline to now make any orders on costs for the Leave Application.

Costs for the Substantive Application and the Reserved Application

19 I next proceed to consider both counsel's submissions in relation to the costs for the Substantive Application and the Reserved Application. Both counsel did not make any submissions that the costs of the Substantive Application should be determined separately from the costs of the Reserved Application. Both counsel appeared content to treat both applications as one for the purposes of costs and I shall proceed to determine the costs on this basis.

20 The AG's counsel raised three arguments. First, he submitted that the general rule enshrined in O 59 r 3(1) that "costs to follow the event" should apply. Second, he submitted that the general rule had not been displaced by any unreasonable conduct on the part of the successful party. Third, he submitted that even if there was a public interest consideration in the common law in other jurisdictions, this dimension did not apply.

21 The Applicant's counsel did not dispute that the general rule was that costs followed the event. He relied on public interest as a ground for departing from the general rule, citing the Court of Appeal decision in *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 ("*Top Ten*") where it was held (at [15]) that, as a starting point, no costs would be ordered against a regulator performing a public duty in the public interest (the "*Baxendale-Walker* principle"). The Applicant's counsel submitted that the *Baxendale-Walker* principle should be extended by analogy to the Applicant, who as a private citizen was carrying out her public duty in requesting the court to determine an important constitutional issue concerning parliamentary representation.

22 I do not accept the stretched analogy used by the Applicant's counsel. There is neither principle nor authority to support the submission by the Applicant's counsel that the *Baxendale-Walker* principle ought to be extended in the manner proposed to include private citizens.

23 The Applicant's counsel finally submitted that, in any event, this was an appropriate case for no order as to costs because the applications involved sufficient public interest dimensions. The Applicant's counsel cited the following reasons in support of his public interest argument:

(a) the Applicant had obtained no private pecuniary gain from these proceedings apart from ensuring compliance with the law and her representation in Parliament;

(b) a significant portion of the public, including constitutional law professors, shared the Applicant's views;

(c) the resolution of the legal question before the court would give finality to an issue of general public administration;

(d) the challenge was "not doomed to fail" as the construction of Art 49 of the Constitution involved a complex, purposive interpretation exercise; and

(e) the Applicant was being represented *pro bono* and had sought amicable avenues of resolution.

Analysis

Judicial review procedure in Singapore

24 The uncertain contours of Singapore judicial review procedure have been brought to the foreground by the applications in OS 196 which turned on our uniquely revised O 53. The unfolding of this series of applications culminating in this costs application illustrates the uncertainty.

25 Under O 53 r 1(2), an applicant may apply for quashing orders, prohibiting orders and mandatory orders by filing an *ex parte* originating summons but leave of court is required to make the principal application. The requirement for leave for judicial review is to enable the court to sieve out frivolous and hopeless applications at an early stage. By contrast, an applicant may apply for a declaration under O 15 r 16 without the leave of court. However, a declaration granted under O 15 r 16 does not have the effect of quashing, prohibiting or mandating decisions or actions. In 2011, O 53 was amended to enable an applicant seeking quashing, prohibiting or mandatory orders to include an application for a declaration: see the Final Judgment at [31]–[34]. This amendment was the source of the procedural uncertainty that influenced the conduct of these applications.

26 The leave application made by way of an *ex parte* application must be supported by a

statement and affidavit which are to be served on the AG no later than the day preceding the hearing of the *ex parte* application: O 53 r 1(3). Such service does not transform what is an *ex parte* application into an *inter partes* application. Accordingly, in the event that the court grants leave, the originating summons, the statement, the supporting affidavit, the order granting leave and the summons filed must be served on all persons directly affected and other parties to the proceedings: see O 53 r 2(3).

27 Singapore's practice with respect to attendance and representation at the *ex parte* leave application hearing is varied. Based on reported decisions, where the putative respondent is a non-governmental tribunal or agency, the AG may nevertheless attend and assist the court in the hearing to decide whether or not to grant leave. However, no reported cases have been brought to my attention in which the AG had sought or had been awarded costs for such attendance.

28 Where leave is granted, the substantive application proceeds between the applicant and the directly affected non-governmental tribunal or agency. In these cases, the AG is *not* a party in such substantive application. However, if it is necessary to ensure that all matters in the cause or matter may be effectually and completely determined or adjudicated upon, the court may on its own motion or upon application order that the AG be joined as a party: O 15 r 6(2)(b).

29 In *Lim Mey Lee Susan v Singapore Medical Council* [2011] SGHC 131, the applicant had served notice of the *ex parte* leave application not only on the AG but also on the putative respondent. The putative respondent's counsel then appeared at the hearing to oppose leave being granted. The court granted leave and awarded costs in the cause: at [19].

30 In *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565, where notice had been served on the AG, the court further directed the Applicant to serve notice on the putative respondent in order to hear their representations at the *ex parte* leave application hearing. Leave was granted but no cost orders were then sought or made.

31 Where the judicial review application is directed at the Government of Singapore ("the Government"), and the AG attends and opposes the application for leave to proceed with the judicial review application as the Government's counsel, it is open to both the applicant and the AG to make costs applications and for the court to award costs for the leave application. In *Jeyaretnam Kenneth Andrew v Attorney-General* [2012] SGHC 210, the application for leave was dismissed with costs ordered against the applicant. Where leave is granted, the corollary principle would be that costs may be applied for by the applicant and the court may in its discretion make a costs order: see O 53 r 1(4).

The applicable law

The Government Proceedings Act

32 The starting point for awarding costs in court proceedings against the Government is s 29 of the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("the GPA") which provides that in any civil proceedings (defined in s 2(2) of the GPA to include judicial review proceedings), to which the Government or a public officer is a party, the court shall have power to order costs for or against the Government or public officer in the same manner and upon the same principles as in proceedings between private persons.

Costs are in the discretion of the Court

33 The principles governing costs application in civil proceedings is encapsulated in O 59. Order 59 r 1 describes the different costs orders and their effects. Order 59 r 2(2) reads:

> Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Supreme Court or the Subordinate Courts, including the administration of estates and trusts shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

34 Order 59 r 3(2) goes on to state the general rule that costs follow the event:

> If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court *shall*, *subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made* as to the whole or any part of the costs.
>
> [emphasis added]

35 The power to award costs is in the full discretion of the court. Order 59 r 2(2) unequivocally states that "the Court shall have full power to determine by whom and to what extent the costs are to be paid." This discretionary power is extremely broad: *Re Shankar Alan s/o Anant Kulkarni* [2007] 2 SLR(R) 95 at [15]. Within this discretionary power, general guidance is provided under O 59 r 3(2) that costs follow the event except where it appears to the court that in the circumstances of the case some other order should be made. The "overriding concern of the court must be to exercise its discretion to achieve the fairest allocation of costs": *Soon Peng Yam and another* (*trustees of the Chinese Swimming Club*) *v Maimon bte Ahmad* [1995] 1 SLR(R) 279 at [31].

36 The underlying common law principles of costs orders in civil and judicial review proceedings was explained in *R v Lord Chancellor*,*ex parte Child Poverty Action Group* [1999] 1 WLR 347 ("*Child Poverty Action Group*") at 355–356 (*per* Dyson J):

> *The starting point must be the basic rule encapsulated in RSC Ord 62, r 3(3) that costs follow the event*. It is true that the role of the court in all public law cases is to ensure that public bodies do not exceed or abuse their powers, but the parties to such proceedings are nevertheless adverse as is the litigation. …
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> I accept ... that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. *If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond.* This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.
>
> ***The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases*** . ... [W]here an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of public funds diverted from the funds available to fulfil its primary public functions. ... It is plainly right that in the normal run of the mill public law case, the unsuccessful party

should pay the other side's costs. ... *Nevertheless, in considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it*.

[emphasis added in italics and bold italics]

37 In Singapore, the general rule that costs follow the event also applies in judicial review proceedings: *Re Siah Mooi Guat* [1988] 3 MLJ 448; *Teo Soh Lung v Minister for Home Affairs and others* [1990] 1 SLR(R) 347; and *Chee Siok Chin and others v Minister for Home Affairs* [2006] 1 SLR(R) 582. It is noteworthy that a successful applicant in judicial review proceedings may be awarded costs, as was the case in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525.

Public interest

38 There are at least two broad circumstances under which the courts have exercised their discretion and made some other order. The first circumstance relates to the conduct of the successful party, and the second concerns public interest. As there is nothing before this court that the conduct of either party would provide grounds for some other order, I shall confine the analysis to the public interest issue.

39 As costs awards are entirely within the discretion of the court, it would be a matter of first principles that public interest constitutes a relevant consideration. The Singapore courts have invoked public interest as a basis to depart from the general rule that costs follow the event with respect to proceedings involving unsuccessful regulators. In *Top Ten*, a case concerning the costs implications for the Law Society in respect of disciplinary proceedings under the Legal Profession Act (Cap 161, 2009 Rev Ed), the Singapore Court of Appeal endorsed (at [24]) the *Baxendale-Walker* principle that costs should ordinarily not be ordered against unsuccessful public bodies performing regulatory functions.

40 The public interest rationale for not ordering costs against the public body exercising a regulatory function was explained in the same case at first instance by Moses LJ in *Baxendale-Walker v Law Society* [2006] EWHC 643 (Admin) at [43]:

> 43. … *A regulator brings proceedings in the **public interest** in the exercise of a public function which it is required to perform.* In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. *Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded.* In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.
>
> [emphasis added in italics and bold italics]

41 On appeal in *Baxendale-Walker v Law Society* [2008] 1 WLR 426, Sir Igor Judge P (as he then was) further refined (at [39]) the above rationale stated by Moses LJ:

39. ... Unless the complaint is improperly brought, or, for example, proceeds as it did in *Gorlov*'s case [2001] ACD 393, as a "shambles from start to finish", *when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event.* ***The "event" is simply one factor for consideration. It is not a starting point*** *.* There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. *One crucial feature which should inform the tribunal's costs decision is that t h e* ***proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest*** *and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of a adverse costs order simply because properly brought proceedings were unsuccessful* might have a chilling effect on the exercise of its regulatory obligations, ***to the public disadvantage*** . …

[emphasis added in italics and bold italics]

42 There is also support from other jurisdictions on the relevance of public interest in the award of costs in public law proceedings: see the Privy Council decision in *New Zealand Maori Council and others v Attorney-General* [1994] 1 AC 466 (concerning the protection of the Maori language in New Zealand); the High Court of Australia decision in *Oshlack v Richmond River Council* (1998) 193 CLR 72 (concerning the preservation of flora and fauna); and the House of Lords decision in *R* (*Corner House Research*) *v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 (concerning the lack of consultation by a governmental department). While what may be regarded as being in the public interest in each of these other common law jurisdictions would be quite different from what the Singapore courts would regard as public interest given our own legal and policy context, there is no doubt that public interest considerations may be taken into account by the court in determining the costs for judicial review proceedings.

43 Turning to the essential characteristics of public interest, it has been held that where a matter raises a legal question of genuine public concern, it may be inappropriate to make a costs order against the applicant even where the judicial review is wholly unsuccessful: see Sir Michael Supperstone *et al*, *Judicial Review* (LexisNexis, 4th Ed, 2010) at [20.24.2]. As a broad general principle, I find Dyson J's holding in *Child Poverty Action Group* (at 353) to be apposite:

I should start by explaining what I understand to be meant by a public interest challenge. ***The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case .*** *It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.* The central submission advanced on behalf of the applicants is that, because of those essential characteristics, the court should be more willing to make no order as to costs against an unsuccessful applicant in public interest challenge cases than in other cases. It is submitted that public interest challenges are not "ordinary litigation" between adverse parties.

[emphasis added in italics and bold italics]

44 At their very core, court proceedings carry public interest where they raise public law issues of general importance, and in which the applicant is not seeking to protect some private interest. It is important to emphasise that public interest dimensions are not established for the purposes of costs by reason only that public law issues are raised or that leave has been granted to proceed with the

judicial review hearing. Ultimately, whether public interest warrants departure from the general rule that costs follow the event will depend entirely on the particular facts in each case.

45 Based on the above analysis, I now come to my decision on the appropriate costs of the applications determined in the Final Judgment. The questions raised in the Reserved Application and determined by the Final Judgment concerned public law issues of general importance. This was underscored by contemporaneous extensive debates amongst Members of Parliament both within Parliament and in the media, constitutional law academics and the public on the internet and print media. Additionally, the Applicant did not have a private interest in the question relating to the filling of vacant seats of elected Members of Parliament. This public interest was extant at the time of the Applicant's reservation of her right to seek the declarations under O 15 r 16, *ie*, the date of the hearing of the Leave Application.

Conclusion

46 In these unusual circumstances, I make no order as to costs for all the applications leading to the Final Judgment and this costs hearing.