

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)**

SUPREME COURT CIVIL APPEAL NO COA2025CV00010

BETWEEN	KENYATHA NEHRU BROWN	APPELLANT
AND	ATTORNEY GENERAL OF JAMAICA	1st RESPONDENT
AND	DIRECTOR OF PUBLIC PROSECUTIONS	2nd RESPONDENT

Written submissions filed by John Clarke for the appellant

Written submissions filed by the Director of State Proceedings for the 1st respondent

No written submissions filed on behalf of the 2nd respondent

23rd February and 8 May 2026

Costs – Award of costs against State entities for application to extend time in constitutional law claims – Applicable principles governing the award of costs – Civil Procedure Rules (2002), Parts 56, 64 and 65

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] I have read, in draft, the judgment of Shelly-Williams JA (Ag) and the dissenting judgment of Foster-Pusey JA. Having done so, and having again reviewed the papers in the matter, I find myself to be in agreement with Shelly-Williams JA (Ag) for several reasons.

[2] For one, it is important to note that the application that led to this appeal was governed by rule 65.8(3)(b) of the Civil Procedure Rules ('the CPR'). That rule provides that, in an application for extension of time, the general rule is for the court to order that the applicant pay the costs unless the applicant satisfies the court that "special circumstances" exist.

[3] To my mind, on the affidavit evidence, it has not been demonstrated that special circumstances exist or existed in this case, justifying a departure from the general rule. "Special" is defined in the Concise Oxford Dictionary, 10th Edition, as including things: "exceptional in quality or degree; unusual; out of the ordinary...".

[4] The term "special circumstances" has also been considered in several cases in a variety of contexts. To take two, for example, in **Jacobson v Lee** [1949] 2 All ER 517, it was held that a change of solicitors and the illness of a managing clerk in a business did not qualify as "special circumstances" within the meaning of an English Rule (Order 55, rule 71), which would otherwise empower a court to hear a liquidator's summons to vary a master's certificate in a debenture-holder's action. At page 519 of the judgment, it was observed that:

"The special circumstances are said to be the change of solicitors and the illness of the managing clerk. I have come to the conclusion that in the present case there are no special circumstances within the meaning or R.S.C., Ord. 55, r. 71."

[5] Similarly, in **Clarks of Hove v Bakers Union** [1978] 1 WLR 1207, it was held by the Court of Appeal of England and Wales that "special circumstances", within the meaning of the Employment Protection Act 1975, "...meant circumstances which were uncommon or out of the ordinary...".

[6] In this case, what are the grounds on which the 1st respondent has sought to oppose the application? These have been summarized (correctly, in my view) by Shelly-Williams JA (Ag) at para. [58] as follows:

“(a) The Attorney General’s Chambers (AG) required time to request instructions. These instructions were requested but were not forthcoming.

(b) The 2nd respondent had been contacted but indicated that the Office of the Director of Public Prosecution (ODPP) required information from ‘the respective court’; and

(c) That the attorney from the AG, who had conduct of the file, was ill and on sick leave.”

[7] As the last-quoted paragraph shows, in the 1st respondents’ affidavit in support of the application (sworn to by Stephen McCreath on 8 November 2024), illness of the Crown Counsel in the office of the 1st respondent, to whom the matter was assigned, was mentioned. He was said to have been out of office on account of illness between 21 October and 1 November 2024. Of course, generally, illness is a factor worthy of consideration. However, it has not been demonstrated in this case how it affected the respondent’s ability to comply with the order granting an extension of time. That period of illness came after the orders were made and a reasonable time would have passed (11 clear days from the learned judge’s orders) before the illness, for instructions to have been requested, and the urgency of the situation brought to the attention of the persons from whom the instructions were sought. It is not as though the affiant is saying that the instructions arrived at the office in the absence of the responsible Crown Counsel and so he was unable to put them into affidavit form in time to meet the deadline. From the material available, up to the point of the application, there is no indication that the instructions had come to hand.

[8] When all matters are considered, it is apparent that no special circumstances were demonstrated in either respondent’s affidavits. In my respectful view, the fact that the 1st respondent is the nominal or notional defendant adds nothing to the circumstances to make them special, as the instances in which the 1st respondent is named other than as a nominal party are rare.

[9] In terms of the contention that the appellant cast his net of allegations very wide, thus making it a challenge to garner all relevant instructions, it is sufficient to observe

that the learned judge was aware of the relatively-wide nature of the allegations (as she raised that issue herself) and, with that in mind, proceeded to make the order for an extension of time for the very period that she did.

[10] There also seems to be an unmet allegation of prejudice put forward by the appellant at para. 26 of the affidavit of Collin Blair – in that the delay in the proceedings made possible the risk of the criminal trial proceeding before the challenges brought by the appellant, in the fixed-date claim form, were addressed. One of those challenges, if successful, could have had the effect of bringing the criminal trial to an end. In the face of this unanswered allegation of prejudice, the respondents have asserted that an order for costs could adequately compensate the appellant.

[11] Finally, seeing that the general rule is for costs to be awarded against the applicant in such an application, unless special circumstances exist, it would be best for a judge who proposes to depart from the general rule, to give reasons (however brief) for doing so – identifying what in his or her view are the special circumstances warranting that departure, thus making an appellate court's enquiry more likely to be limited to the question of whether the identified circumstances do in fact qualify as special.

[12] For the reasons stated above, I agree with the reasoning and conclusion of Shelley-Williams JA (Ag), and her proposed orders disposing of the appeal.

FOSTER-PUSEY JA (DISSENTING IN PART)

[13] I agree with the proposed outcome of the appeal in respect of the Office of the Director of Public Prosecutions ('ODPP'). However, I believe that it was open to the learned judge to conclude that special circumstances were established in respect of the Attorney General of Jamaica ('AG'). I outline my reasons below.

[14] I gratefully adopt paras. [39]-[41] of the background outlined in my learned sister's judgment.

[15] On 24 June 2024, the appellant filed a fixed date claim form seeking constitutional relief. He served the respondents to the claim, the AG and the ODPP, on 18 September 2024. As an aside, I notice that the order in respect of the 2nd respondent states:

“1. The 2nd [respondent] is granted an extension of time to file and serve affidavit evidence in response to the [appellant][sic] fixed date claim form which was filed on June 24, 2024. The 2nd [respondent] is permitted to file and serve his affidavit evidence in response to the Fixed Date Claim Form which was filed on June 24, 2024. The 2nd [respondent] is permitted to file and serve her affidavit evidence on or before February 21, 2025.”

[16] It is a similar position with the order relating to the 1st respondent. The orders of the court do not mention the date on which the fixed date claim form was served on the respondents, even though that date is critical to determining the deadline for their filing of affidavits in response.

[17] The appellant seeks declarations pursuant to a number of provisions of the Constitution of Jamaica, including:

- i. Section 14(1): no person is to be deprived of his liberty except on reasonable grounds;
- ii. Section 14(3): any person arrested or detained is entitled to be tried within a reasonable time, is to be brought forthwith or within a reasonable time before an officer authorised by law or a court, and released unconditionally or upon reasonable condition to secure his attendance at court;
- iii. Section 14(4): a person awaiting trial and detained in custody is entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody; and
- iv. Section 16(1): every person is entitled to a fair hearing within a reasonable time.

[18] One of the declarations the appellant wants the court to make is that the ODPP had a duty to ensure the new trial was held at the next sitting of the Westmoreland Circuit Court, as ordered in this court's judgment in May 2018.

[19] The appellant seeks other declarations that mainly require submissions on issues of law. Some of which have previously been ruled on by this court.

[20] Apart from the declarations referring to the Crown (in relation to the new trial and relevant indictment), the appellant refers to a failure on the part of the "State", and he refers to no examination having been done "by the material state organs, of the issue of his liberty".

[21] In making the claim against the AG, the appellant stated that the AG "is joined by section 13(2) of the Crown Proceedings Act and as the notional defendant for constitutional motions against the State". Importantly, rule 56.11(3) of the CPR provides that a claim form related to an application for constitutional relief (for an administrative order) must be served on the AG. There are, in fact, occasions when the AG appears at the invitation of the court in matters where constitutional issues arise and makes submissions, although not filing affidavit evidence.

[22] The AG and the ODPP are not in the same position when it comes to matters arising out of criminal proceedings. The ODPP prosecutes criminal matters in the circuit courts.

[23] To respond to the claim at bar and put the court in a position to determine whether to grant the requested declarations, the ODPP must review its files and, in many cases, seek to obtain the relevant court records. Since its office is involved in the criminal trial, it would be expected to have some material, even if incomplete.

[24] The AG's Chambers ('AGC'), on the other hand, is unlikely to have any records in its offices that would enable it to respond to this type of claim. It must attempt to identify the likely relevant State agencies or organs and seek the relevant information. By

describing the AG as a “notional defendant” for constitutional matters, the appellant recognises that the claim differs in nature from many of the matters regularly filed and pursued in our courts. For example, in a breach of contract case, one expects that, in the pleadings, each side will present its version of what occurred. The AG, in such a case, could request instructions from the ministry or government agency involved, which are seen as servants of the Crown. The “notional defendant” in this instance has not been directed to any specific State organ, ministry, department, Crown servant, or agency apart from the ODPP, who is a party to the claim. It is understood, of course, that information will be needed from the courts. However, the courts are distinct from the departments or agencies of the Crown.

[25] This is why, understandably, the AGC indicated in an affidavit that it asked for instructions from the ODPP and the respective court offices.

[26] In order to assess this matter properly, it is also necessary to examine the applicable rules and timelines. Rule 56.12 of the CPR provides that evidence in answer to a claim for an administrative order must be made by affidavit, and the provisions of Part 10 of the CPR (defence) apply. Rules 10.2 and 10.3 of the CPR, when read together, provide that the affidavit in response should be filed 42 days after the service of the claim form. This meant that, having been served on 18 September 2024, the AG and ODPP, if they saw fit, ought to have filed affidavits in response by the end of October 2024. Therefore, when the first hearing was held by Wint Blair J, on 9 October 2024, the time for filing the affidavits in response had not yet elapsed. Wint Blair J ordered the respondents to file affidavits in response by 6 November 2024, a short extension of time.

[27] In my view, the standard 42 days provided in rule 10.3(1) of the CPR, which applies to applications for administrative orders, is likely insufficient to gather the necessary information in these cases, except in constitutional matters of very limited scope that require minimal factual detail.

[28] The appellant's case is not limited in scope. In fact, at the first hearing, according to affidavit evidence from the AG, Wint-Blair J encouraged the appellant to narrow the pleadings so that the respondents would know what case they had to answer. Additionally, the judge also emphasised that the appellant had not provided any details about the State organs against which the constitutional breaches were alleged.

[29] It might be helpful to consider, in the future, whether rule 56.11(2) of the CPR applies in cases of this type. It states:

- “56.11 (1) ...
(2) Where the application -
(a) relates to any proceedings in or before a court; and
(b) has the object either-
(i) to compel the court or an officer of the court to do any act relating to; or
(ii) to quash
those proceedings,
the claim form and affidavit in support must be served on the clerk or registrar of the court and on the judge if any objection is taken to the conduct of the judge.”

The appellant's application relates to proceedings before a court, and he seeks to stay the relevant indictment and prevent the criminal proceedings from continuing. His application concerns trial within a reasonable time, the right to bail, and the alleged deprivation of his liberty, among other things. Had the documents been served on the relevant court office, it is quite possible that earlier progress could have been made in securing the necessary information.

[30] As demonstrated in judgments resolving constitutional claims, such as those involving the right to a timely hearing, a factual matrix must be presented to the court for assessment and decision.

[31] In the affidavit of Stephen McCreath, supporting the AG's application for an extension of time, he deposed as follows:

- "6. Given the nature of the allegations, the [1st respondent] must request instructions and thereafter a file review conducted to ascertain the nature of the response to the claim. The production of these instructions requires an investigation on the part of the relevant state organs regarding the allegations raised. Though, as the learned judge highlighted the [appellant] has not provided any details regarding the relevant state organs against whom the supposed breaches are alleged, the [1st respondent] has requested instructions from the [ODPP] and by extension, the respective Courts' offices to determine whether such instructions would be sufficient to answer the claim as filed.
7. I am advised by Jovan Bowes, Attorney-at-law with conduct of the file and do verily believe that as of the 7th of November 2024 when he made contact with the [ODPP], instructions from the respective Courts was [sic] still outstanding."

[32] In my view, the AG is in a special position in this particular claim. The CPR mandates that the AG must be served whenever constitutional relief is sought, yet in this claim, no servants or agents of the Crown are identified from whom it is to seek instructions. It is, therefore, not correct to refer to the AG as being "at fault" in these circumstances, and it would not be appropriate for the AG to be penalised in costs. Respectfully, it was open to the learned judge to have made no order as to costs against the AG. It has not been demonstrated that the learned judge erred in law or in fact in the exercise of her discretion in this regard.

[33] Returning to the learned judge and her decision in the case at hand in relation to the ODPP. The appellant referenced in the notice and grounds of appeal "oral utterances made by counsel" from the ODPP regarding the efforts required to obtain the documentation needed to respond to the claim. Counsel stated that he had to go to the court in Hanover to look for the relevant documents. Unfortunately, this meant counsel

appeared in the matter and also gave oral evidence. Counsel for the appellant seems to believe that these utterances led the learned judge to conclude that there was a compelling reason to refuse an order for costs against the ODPP. Counsel for the ODPP ought to have ensured that any relevant evidence was reflected in an affidavit so that the learned judge could properly take it into account and accord it the appropriate weight.

[34] By 29 January 2025, when the application for an extension of time was heard, a significant amount of time had passed since the fixed date claim form was served on the AG and ODPP on 18 September 2024, and the deadline for filing affidavits in response had already expired on 6 November 2024. Despite the special nature of the claim and the many issues raised by the appellant, more detailed affidavit evidence should have been provided to explain why nothing had been filed yet, giving the learned judge enough information to decide whether there was a strong reason to deny an order of costs in favour of the appellant. It is reasonable to expect that the ODPP should, by that time, have had, at least, some information in its files, even if incomplete.

[35] I now consider the issue of costs and the respondents' positions on it. The appellant incurred costs opposing the respondents' applications. A legal clerk in counsel for the appellant's office deposed to a lengthy affidavit in response to the applications. Apart from addressing the appellant's concern that the grant of the application could have a negative impact on the pending criminal trial, it included several paragraphs of argument as to why the application should not be granted. One may question the need for aspects of the affidavit. However, there is no gainsaying that, given the considerable time that had elapsed by 17 January 2025, when the appellant filed the affidavit opposing the applications, it was understandable that he would wish to oppose the applications and take the opportunity to highlight his concerns about the pending criminal trial. The appellant clearly incurred costs in this regard.

[36] The respondents, in their affidavits in support of the applications, stated that the appellant would not be prejudiced in pursuing his claim if the applications were granted. They went on to say, however, that if the appellant were to be prejudiced, an award of

costs would sufficiently compensate him. This meant that the appellants expected the learned judge to weigh all the circumstances to determine whether the appellant was prejudiced and, if so, thereafter, determine whether costs would be appropriate. Respectfully, I did not see this as the respondents expecting costs to be ordered against them. In fact, they asked for costs to be costs in the claim.

[37] Rule 65.8 of the CPR states that when an application seeks to extend the time for performing any act under the rules or a court order or direction, the court “must order the applicant to pay the costs of the respondent unless there are special circumstances”. I agree that, despite the involved nature of this particular claim, there was insufficient material before the learned judge to establish special circumstances justifying the decision to make no order as to costs in relation to the ODPP’s application. However, in my respectful view, there was ample basis in law and in fact for that order to be made in respect of the AG for the reasons outlined above.

[38] I would, therefore, propose that the appeal be allowed solely in relation to the ODPP and the learned judge’s ruling be otherwise upheld.

SHELLY-WILLIAMS JA (AG)

[39] This appeal challenges the decision of Nembhard J, in which she made no award of costs after granting applications extending time for the respondents to file affidavits in a constitutional claim.

Background

[40] The appellant was charged and convicted in the Westmoreland Circuit Court. The conviction was overturned in 2018, and a retrial was ordered. In the decision of **Kenyatha Brown v R** [2018] JMCA Crim 24, Phillips JA, at para. [44] of the judgment, ordered that:

“We therefore order that the appeal is allowed, the conviction is quashed and sentence set aside; and in the interests of

justice, a new trial is ordered to take place at the next sitting of the Westmoreland Circuit Court.”

[41] The retrial has not yet occurred, and the appellant filed a fixed-date claim form on 24 June 2024, seeking the following declarations and orders:-

“1) A [d]eclaration that section 16(1) of the Constitution which afford the Claimant the right to a fair hearing within a reasonable time by an independent and impartial court has been infringed.

2) A declaration that the 2nd Defendant had a duty to ensure that the new trial was held at the next sitting of the Westmoreland Circuit Court as ordered in the Court of Appeal judgment in May 2018.

3) A declaration that the states’ [sic] failure to adhere to the Court of Appeal’s order in relation to new trial resulted in the state being unable to proceed with the new trial since the said order has expired.

4) A declaration that the [C]rown cannot proceed to try the claimant on the expired new trial order and as such the indictment is permanently stayed.

5) A declaration that section 14(1) of the Constitution which guaranteed the Claimant that no person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law was breached when he was detained from May 2018 till the new trial date without any examination, by the material state organs, of the issue of his liberty.

6) A declaration that section 14(4) of the Constitution which guaranteed the Claimant that he shall not be kept in custody unless sufficient cause is shown to keep him there was infringed around May 2018.

7) A [d]eclaration that sections 31(3) and 31(3A) of JAJA are unconstitutional, void and of no effect in that:

(a) it allows for the deprivation of an appellant’s liberty pursuant to a sentence without such deprivation being reckoned as executing such sentence, contrary to ss 13(3)(a) and 14(1)(b) of the Constitution; and

(b) it provides for deprivation of liberty outside of reasonable grounds and fair procedures as guaranteed by section 14(1) of the Constitution.

8) A declaration that the Claimant's constitutional right to liberty was breached by his detention pursuant to section 31 of JAJA during periods when he was effectively not serving any sentence of the court.

9) A declaration that the mandatory minimum sentence of 15 years for rape is unconstitutional, null and void and violates the principle of separation of powers and the claimant's right to be sentenced by judicial actor.

10) The Claimant is awarded constitutional damages to be assessed as compensation for the breach of his right under section 14(1), 14(3), 14(4) and 16(1) of the Constitution.

11) Such further order, declaration, writ, direction and other relief as the court considers appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Chapter 3 to the protection of which the Claimant as the person concerned is entitled.

12) Costs."

[42] The Civil Procedure Rules (2002) ('CPR') mandate timelines after filing a fixed-date claim form, including the submission of affidavits in response and the first hearing. The respondent failed to file the required affidavits in response. The claim was scheduled for the first hearing on 9 October 2024, when Wint-Blair J allocated time for the respondents to submit their affidavits in response. On 8 November 2024, the 1st respondent submitted an application supported by an affidavit seeking an extension of time to file the response affidavit. On 14 November 2024, the 2nd respondent also filed an application for an extension of time to submit a response affidavit. The appellant filed an affidavit opposing both extension requests on 17 January 2025.

[43] The applications were heard by Nembhard J on 29 January 2025, at which time the respondents were granted an extension of time to file their affidavits in response. No

order was made regarding costs. Leave was granted for the appellant to challenge the issue of costs.

[44] The appellant filed his notice of appeal and grounds on 7 February 2025. The grounds of appeal are as follows:

“1) The learned judge erred in failing to consider the general rule that the party seeking an extension of time to adhere to court rules/orders would typically pay the costs of the faultless respondent.

2) The learned judge erred in failing to give proper consideration to the affidavit from both applicants, which indicated that costs would serve as an adequate remedy for the prejudice suffered by the appellant due to their respective applications.

3) The learned judge failed to give proper consideration to the fact that the Respondent was faultless concerning the Defendants second default to adhere to the timeline set by the court for filing its defence to the material claim and should not have been penalised by a ‘no order as to costs’.

4) The learned judge erred in failing to consider, or to adequately consider, that the faultless Appellant had incurred costs in response to the state’s application and that the overriding objective would be served by him receiving cost [sic] orders.

5) The learned judge, in the circumstances, erred in principle by considering matters that should have been disregarded, overlooking matters that ought to have been accounted for, and reaching a decision so evidently flawed that it can be deemed perverse.”

Issue

[45] The issue which this court has to determine is whether, in the circumstances of this case, the learned judge erred in the exercise of her discretion in not awarding costs.

Appellant's submissions

[46] In written submissions, counsel for the appellant submitted that this is a public law case where the claimant alleges that his constitutional rights were violated and seeks several declarations and damages. Counsel argued that the respondents had been negligent by not filing their defence within the 28 days stipulated by the CPR and worsened the situation by failing to file their affidavit in response as per the case management order given at the first hearing of the fixed date claim form. Counsel also argued that the respondents, in filing the application for an extension of time, understood that they would be required to pay the appellant's costs. This was reflected in the affidavit filed by Stephen McCreath in support of the extension of time application filed by the Director of State Proceedings, who appeared for the 1st respondent. This position was also stated in the affidavit of Mr Janek Forbes in support of the application for the 2nd respondent.

[47] The appellant's position is that the learned judge erred in not awarding costs in the application, considering:

- a) the circumstances of this case, where the claim before the court is based on the fact that there has been a delay;
- b) the respondents' delay in filing their affidavit in response;
and
- c) the respondents' acknowledgment that costs would compensate for the delay.

[48] Counsel, relying on the cases **Toussaint v Attorney General** [2007] UKPC 48 and **Boodram v Attorney General of Trinidad and Tobago** [2022] UKPC 335, argued that, despite the special rules that apply to public law cases, as outlined in rule 56.15(4) and (5), a costs award should have been granted.

[49] Counsel submitted that the at-fault party should pay costs related to the application for an extension of time. He relied on the cases of **Stewart Brown Investment Limited v Morris Hill Limited** [2023] JMSC Civ 140 and **Signature Planning Investment Ltd v Harmony Management Ltd** 2022/CLE/Gen/FP 00133.

Respondent's submissions

[50] Written submissions were filed only on behalf of the 1st respondent. Counsel for the 1st respondent, relying on **Attorney General of Jamaica v John McKay** [2012] JMCA App 1, identified the factors this court ought to consider when reviewing a lower court judge's exercise of discretion. In relation to grounds 1 and 2 counsel, citing **Eduardo Anderson v National Water Commission** [2015] JMCA App 15, argued that the judge had discretion to issue the costs order under section 28E(1) of the Judicature (Supreme Court) Act and under Parts 64 and 65 of the CPR.

[51] Counsel first noted that the delay was not particularly long. Counsel contended that, given the circumstances of this case, where the 1st respondent had to obtain instructions from different government agencies and gather material from a court's office, the learned judge correctly exercised her discretion in not awarding costs. Counsel further argued that, if this argument did not persuade the court, the judge's order could be replaced with an order that costs be in the claim.

[52] With reference to grounds 3 to 5, counsel argued that the learned judge properly considered all the facts and issues before her and cannot be faulted for her understanding of the law. Accordingly, the appeal should be dismissed.

Analysis

[53] When granting leave to appeal a judge's discretionary decision on an interlocutory application or a lower court's decision, it must be shown that the decision in question was reached in error. This court cannot base its ruling on the idea that we would have "exercised the discretion differently". See **The Attorney General of Jamaica v John**

Mackay, where the frequently cited **Hadmor Productions Ltd v Hamilton** [1982] 1 ALL ER 1042 was referenced and the principles therein applied.

[54] Section 28E (1) of the Judicature (Supreme Court) Act provides that a judge has discretion regarding costs in interlocutory proceedings. Section 28E(1) states that:

“Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.”

[55] Rules were issued in 2002 to guide procedures in civil cases. Section 56.15(5) covers cost awards in administrative hearings. It states that:

“The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.”

[56] There have been several rulings on whether costs should be awarded in administrative cases. In **Boodram v Attorney General of Trinidad and Tobago**, the appellant, who had been sentenced to death following a conviction for murder, filed a constitutional challenge seeking to have his sentence commuted due to delay. A cross-appeal was also filed on whether costs should be awarded to the appellant. Lord Lloyd-Jones and Sir Tim Holroyde, writing on behalf of the Board, in paras. 51 to 54 of the judgment, discussed the general rules concerning costs. The law lords stated:

“51. Turning to the cross-appeal, we are satisfied that the Court of Appeal, with all respect to it, fell into error in declining to make any order as to costs. The general rule in Trinidad and Tobago is that the unsuccessful party will be ordered to pay the costs of the successful party: see rule 66.6 of the Civil Proceedings Rules 1998, and the observations of the Board in *Seepersad v Persad* [2004] UKPC 19, (2004) 64 WIR 378, para 24:

‘The award of costs in Trinidad and Tobago is in the discretion of the court, as is usual in most common law

jurisdictions. The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event.'

52. Mr Boodram had appealed against the High Court's dismissal of his claim, arguing as a matter of principle that the court had a discretion as to the appropriate substitute sentence. He was wholly successful in his appeal. The fact that the Court of Appeal was unable to determine the appropriate sentence, and that the decision in that regard was accordingly remitted to the High Court, does not detract from his success on the important point of principle which lay at the heart of his appeal. Moreover, the appeal was of great importance to Mr Boodram personally: it was not an academic exercise, even if the ultimate decision of the High Court may leave him in the same position as he was in when he issued his claim.

53. Where an individual challenges the state on an important point of constitutional law or principle, and is unsuccessful, there will generally be good reason not to make any order for costs against him: as was said in *Ahnee v Director of Public Prosecutions (Mauritius)* ... [1999] 2 AC 294, 307G, 'bona fide resort to rights under the Constitution ought not to be discouraged'. It would be particularly regrettable if such resort to constitutional rights were discouraged in circumstances where the applicant is under sentence of death, even if that sentence can no longer be implemented. But where the individual is successful, there will in general be no good reason to deny him his costs simply because the decision of the appellate court not only determines his case but also serves to provide valuable guidance for other litigants. The case law relied on by the Attorney General does not support the submission that there is a general practice not to award costs in such circumstances. Moreover, a general rule precluding individuals from recovering their costs despite having succeeded on an important point of principle would tend to have a chilling effect on public law challenges to unlawful action by the state. So too would a general rule that any award of costs in favour of the successful individual should be made on a pro bono basis, thus doing no more than reimbursing him for his out of pocket expenses.

54. We therefore conclude that there was no good or sufficient reason for the Court of Appeal to depart from the

normal practice of ordering costs to follow the event. Nor would there be any good reason for awarding costs only on a pro bono basis (assuming that such an award could be made in principle). Having succeeded in his appeal, Mr Boodram should have been awarded his costs in the High Court and in the Court of Appeal. His cross-appeal must accordingly succeed.”

[57] The principles outlined in **Boodram** address the issue of costs following a full hearing of constitutional cases. In this instance, the claim has not advanced beyond the pleadings and affidavits. These applications sought an extension of time to file affidavits on behalf of the respondents, so the applicable rule is 65.8. Rule 65.8, which pertains to interlocutory proceedings, states that:

“(1) On determining any application except at a case management conference, pre-trial review or the trial, the court must decide which party, if any, should pay the costs of that application, and may -

(a) summarily assess the amount of such costs in accordance with rule 65.9; and

(b) direct when such costs are to be paid.

(2) In deciding what party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

(3) The court must however take account of all the circumstances including the factors set out in rule 64.6(4) **but where the application is –**

(a) one that could reasonably have been made at a case management conference or pre-trial review;

(b) to extend the time specified for doing any act under these Rules or an order or direction of the court;

(c) to amend a statement of case; or

(d) for relief under rule 26.8 (relief from sanctions),

the court must order the applicant to pay the costs of the respondent unless there are special circumstances.” (Emphasis added)

[58] As emphasised in the excerpt above, the applications for an extension of time fell under rule 65(8)(3)(b) and, therefore, the question was whether the appellant was entitled to costs. In the case of **Eduardo Anderson**, Morrison JA (as he then was), at para. [46], addressed the award of costs in interlocutory proceedings where he stated: -

“... Rule 64.6(1) of the CPR provides that, if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party; while rule 65.8(3)(b) directs that, where the application under review is ‘...to extend the time specified for doing any act under these Rules or an order or direction of the court, the court must order the applicant to pay the costs of the respondent unless there are special circumstances’. In this case, it was submitted, no special circumstances have been made out by Mr Anderson so as to take the matter outside the direct mandate of rule 65.8(3)(b): the notice of appeal and NWC’s bundle of submissions and authorities were served on Mr Anderson in good time (on 5 November 2014) and he allowed approximately two months to elapse without filing his submissions as required by the CAR. Accordingly, the need for extension of time was occasioned by Mr Anderson’s own dilatory conduct.”

[59] The learned judge found that, in the circumstances of this case, no costs should be ordered. What then are the circumstances of this case? This is a case in which the appellant seeks declarations regarding the delay in proceeding with his retrial, which this court ordered in 2018. The respondents failed to file the affidavits in response prior to the first hearing and, after being granted additional time to comply with the rules of court, failed to file them within the stipulated time established by order of the court. The reasons advanced for the delay by the 1st respondent were that:

(a) The Attorney General’s Chambers (AG) required time to request instructions. These instructions were requested but were not forthcoming.

(b) The 2nd respondent had been contacted but indicated that the Office of the Director of Public Prosecution (ODPP) required information from 'the respective court'; and

(c) That the attorney from the AG, who had conduct of the file, was ill and on sick leave.

[60] The 2nd respondent had filed an affidavit in support of the extension of time, and the reasons advanced as to the delay in filing an affidavit in response to the fixed date claim form were that:

1) The matter had recently been assigned to the affiant, who is an assistant director of public prosecution, and

2) The ODPP was awaiting information from the Hanover Parish Court.

[61] The reasons advanced by both respondents in the affidavits in support of their request for an extension of time are vague and unhelpful, and do not constitute special circumstances. The ODPP provided no explanation for why the necessary information could not have been obtained within the allotted time frame. There is no affidavit evidence regarding the information requested from the Parish Court. The 1st respondent's reasons were even less clear, as the entity from which the 1st respondent was supposed to obtain information to file the response affidavit was the ODPP, who is a named defendant before the court.

[62] This is especially notable considering rule 56, which addresses administrative law cases. Rule 56.13(1) states that: -

"At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply."

[63] I also note that, based on the affidavits of the 1st and 2nd respondents filed in support of the application for extension of time, they both expected that costs could be ordered against them. Para. 11 of the affidavit of Mr. Steven McCreath, on behalf of the 1st respondent, stated that: -

“Moreover, if the order is not granted, the 1st [respondent] will suffer prejudice in that he will not have the opportunity to provide evidence necessary to defend the claim. The [appellant] will not be prejudiced in the pursuit of his claim and if prejudiced, an award of cost will sufficiently compensate for same.”

Similarly, para. [10] of the affidavit of Mr Janek Forbes on behalf of the 2nd respondent stated that:-

“Moreover, if the Order is not granted, the 2nd [respondent] will suffer prejudice in that they will not have an opportunity to provide evidence necessary to defend the claim. The [appellant] will not be prejudiced in the pursuit of his claim and if prejudiced, an award of cost will sufficiently compensate for same.”

[64] The affidavit evidence presented to the learned judge did not demonstrate any exceptional circumstances. The respondents failed to use the time allotted under the CPR to file their defence. They were given additional time at the first hearing to fulfill their obligations and file their defence, but they failed to do so. The reasons advanced for failing to file the defence were vague and lacked detail. This must be coupled with the fact that the respondents seemed to have accepted that costs would be adequate compensation to the appellant for granting an extension of time.

[65] I, therefore, find that, considering the circumstances of this case, the learned judge erred in not ordering that costs be paid by both respondents in respect of their applications for an extension of time.

[66] Accordingly, I would allow the appeal, set aside the order made in the court below and award costs of the applications and the appeal to the appellant against both respondents to be agreed or taxed.

F WILLIAMS JA

ORDER

By majority (F Williams JA and Shelly-Williams JA (Ag), Foster-Pusey JA dissenting, in part)

1. The appeal is allowed.
2. Order 2 of the learned judge's order is set aside.
3. Costs are awarded to the appellant against both respondents in their applications for extension of time in the Supreme Court, to be agreed or taxed.
4. Costs to the appellant in the appeal to be agreed or taxed.