

SUPREME COURT OF QUEENSLAND

CITATION: *Chibanda v Chief Executive, Queensland Health & Anor*
[2018] QCA 334

PARTIES: **JOHN CHIBANDA**
(applicant)
v
CHIEF EXECUTIVE, QUEENSLAND HEALTH
(first respondent)
MEDICAL BOARD OF AUSTRALIA
(second respondent/not a party to the application)

FILE NO/S: Appeal No 9021 of 2018
SC No 12141 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 128 (Applegarth J)

DELIVERED ON: 4 December 2018

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Gotterson JA

ORDERS:

- 1. Pursuant to r 670(1) of the *Uniform Civil Procedure Rules 1999* (UCPR), the applicant, John Chibanda, is to provide to the first respondent, the Chief Executive, Queensland Health, security for its costs of his application for an extension of time pursuant to r 748 of the UCPR, in an amount of \$6,000 and in a form suitable to the Registrar by 4 pm on 7 January 2019.**
- 2. Until the security is provided, the application for extension of time and any appeal contemplated by it, are stayed so far as they concern steps to be taken by the first respondent.**
- 3. The costs of this application for security for costs are reserved.**
- 4. The application filed by the applicant on 23 October 2018 is refused with no order as to costs.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where the applicant applied for a statutory order of review – where the respondents applied, pursuant to s 48 of the *Judicial Review Act 1991* (Qld) to dismiss the applicant’s proceeding – where

the applicant cross-applied for an extension of time for applying for a statutory order of review – where the applicant’s application and cross-application were dismissed – where the applicant applied for an extension of time within which to appeal – where the first respondent applied for security for costs – whether the applicant should pay security for costs of his application for an extension of time

Uniform Civil Procedure Rules 1999 (Qld), r 670(1), r 772

Bell v Bay-Jespersen [2004] 2 Qd R 235; [\[2004\] QCA 68](#), approved

Muir & Anor v McGowan & Ors [\[2010\] QCA 154](#), approved

COUNSEL: The applicant appeared on his own behalf
B Cramer (*sol*) for the first respondent

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the first respondent

- [1] **GOTTERSON JA:** On 4 June 2018, a judge of the Trial Division dismissed an application for a statutory order of review which had been initiated by Dr John Chibanda on 16 November 2017 against the Chief Executive, Queensland Health (“Chief Executive”), as first respondent, and the Medical Board of Australia (“MBA”), as second respondent. Later, on 22 June 2018, his Honour ordered that Dr Chibanda pay the respondents’ costs of the proceeding.
- [2] The Chief Executive and MBA had applied pursuant to s 48 of the *Judicial Review Act 1991 (Qld)* (“JRA”) to dismiss Dr Chibanda’s proceeding because:
- (a) it was filed years after the time limit for commencing such a proceeding; and
 - (b) it did not disclose a reasonable basis for concluding that the decisions sought to be challenged by Dr Chibanda were amenable to judicial review.

The dismissal order was made on this application.

- [3] Dr Chibanda had cross-applied for an extension of time for applying for a statutory order of review. His cross-application was also dismissed on 4 June 2018.
- [4] Later, on 23 August 2018, Dr Chibanda filed an application, pursuant to r 748 of the *Uniform Civil Procedure Rules* (“UCPR”), for an extension of time within which to appeal to this Court against the judgment given on 4 June 2018. The respondents to this application are the Chief Executive, as first respondent, and the MBA, as second respondent. Dr Chibanda also filed an affidavit to which he exhibited a proposed notice of appeal. The Chief Executive and the MBA are named first respondent and second respondent to the proposed appeal.
- [5] It is in these circumstances that the Chief Executive has applied under r 772 of the UCPR for an order for security for costs.
- [6] I should say immediately that there are decisions of this Court to the effect that where leave to appeal is sought, there is no appeal on foot and the discretion in r

772 is not engaged. I refer to *Bell v Bay-Jespersen*¹ and *Muir & Anor v McGowan & Ors.*² Those decisions, however, held that where an application for leave to appeal is pending, security for costs of the application may be awarded under the more general provision in r 670(1) of the UCPR.

- [7] By parity of reasoning, r 772 is not engaged when an appeal has not been instituted within time; no notice of appeal has been filed; but an application for extension of time for filing and serving such an application has been made but is not determined. That is the position here. By further partitive reasoning, r 670(1) would, nevertheless, permit this Court to order security for costs of the application for extension of time. I propose to treat the application before me as such an application.
- [8] A highly relevant matter for present purposes is the prospects of success that the application for an extension of time has. Since it is the Chief Executive only who is applying for security of costs, the appropriate frame of reference is, in my view, the prospects of success of the application for the extension of time insofar as it relates to an appeal against the dismissal of Dr Chibanda's proceeding against the Chief Executive and against the dismissal of the cross-application for an extension of time to commence a proceeding against the Chief Executive.
- [9] Given that the delay in applying to this Court for an extension of time for filing a notice of appeal is relatively short, such prospects of success will depend, very significantly, on Dr Chibanda's prospects of success of appealing against the dismissal of his proceeding against the Chief Executive.
- [10] The learned primary judge identified the "decision" for which judicial review was sought by Dr Chibanda as being a "decision" by way of an investigative report, and subsequent approval of it, in 2010 and 2011 respectively, relating to Dr Chibanda's professional conduct. His Honour concluded that Dr Chibanda had not made out a case that either the investigative report or the approval of it was a decision to which the JRA applied.³ Moreover, he considered that, in any event, there was a lack of any apparent merit in the proposed challenge to the report.⁴
- [11] Further, his Honour observed that even if Dr Chibanda had had a case for judicial review, he should have pursued it promptly on the basis of what he knew in 2011 instead of waiting years to do so. No adequate explanation had been given for the delay.⁵
- [12] I have considered his Honour's reasons, the proposed grounds of appeal, and the parties' material and written submissions. I have a clear impression that a challenge in this Court to the dismissal of the proceeding against the Chief Executive would be difficult for Dr Chibanda to win. No apparent legal error in the reasoning of the learned primary judge is demonstrated. It follows that, in my view, his prospects of obtaining an extension of time for appealing against the dismissal of his proceeding against the Chief Executive are very limited.
- [13] Another relevant factor for my decision is Dr Chibanda's financial position. According to a statement exhibited to his affidavit filed on 23 August 2018, he has

¹ [2004] QCA 68; [2004] 2 Qd R 235 per McPherson JA at [12], referring to *Stone v Copperform Pty Ltd* [2001] QCA 7; [2002] 1 Qd R 106.

² [2010] QCA 154 per White JA.

³ Reasons [29].

⁴ *Ibid.*

⁵ Reasons [24], [25].

very limited means. He has not yet paid the costs ordered against him at first instance.

- [14] In my view, these two factors, particularly the poor prospects of success, combine to make a sound case for an order for the provision of security for costs. There is a very significant risk that in the likely event that the extension of time is refused with costs, those costs will not be paid.
- [15] Mr B Cramer, Assistant Crown Solicitor, has made an affidavit in which he swears to an estimate of the Chief Executive's costs of the application for extension of time and of the appeal itself. The estimate is \$9,000.
- [16] According to the practice of this Court, it is highly likely that the application for extension of time will be heard concurrently with a hearing of the merits of the proposed appeal. It is therefore reasonable to include in the security for the application for extension, allowance for the costs of a hearing on the merits.
- [17] Given that costs will, in all probability, be ordered on the standard basis, I consider that \$6,000 is an appropriate amount for the security. It should be provided in a form suitable to the Registrar by 4 pm on 7 January 2019. I further consider that the costs of this application should be reserved.
- [18] Finally, I note that on 23 October 2018, Dr Chibanda filed an application for an order that the Chief Executive's application for security for costs be rejected. That application ought to be refused.
- [19] The orders of the Court are:
1. Pursuant to r 670(1) of the *Uniform Civil Procedure Rules 1999* (UCPR), the applicant, John Chibanda, is to provide to the first respondent, the Chief Executive, Queensland Health, security for its costs of his application for an extension of time pursuant to r 748 of the UCPR, in an amount of \$6,000 and in a form suitable to the Registrar by 4 pm on 7 January 2019.
 2. Until the security is provided, the application for extension of time and any appeal contemplated by it, are stayed so far as they concern steps to be taken by the first respondent.
 3. The costs of this application for security for costs are reserved.
 4. The application filed by the applicant on 23 October 2018 is refused with no order as to costs.