QBG 239 of 2019 - JCB

Terence Kashuba and Lloyd Ludwig v The Rural Municipality of Wilton No. 472

Gerald Heinrichs for The Rural Municipality of Wilton No. 472 (respondent)

FIAT - March 6, 2020 - ZUK J.

Introduction

[1] Terence Kashuba [Mr. Kashuba] and Lloyd Ludwig [Mr. Ludwig], [applicants] are residents of the Hamlet of Lone Rock which is situate within the Rural Municipality of Wilton No. 472 [the R.M.]. The parties are involved in a series of legal battles. This application represents one of those skirmishes.

[2] The applicants seek a number of remedies, as follows:

1) An order pursuant to s. 358 of *The Municipalities Act*, SS 2005, c M-36.1 [*Act*] quashing or setting aside resolutions, bylaws or decisions made by the R.M. regarding;

    a. The operating budget for the organized Hamlet of Lone Rock;

    b. The utility billing submitted by the R.M. to the residents of Lone Rock.

2) An order setting aside resolutions, bylaws or decisions made by the R.M. to implement a separate water and sewer billing for residents of Lone Rock pursuant to s. 23(3) of the *Act* as the decisions were made without consultation, notification and were made in bad faith;

3) Directions regarding the scope of the petition regarding Lone Rock and specifically whether s. 132(2) of the *Act* requires signing by the greater of 15 percent of the population or 25 voters of the Municipality refers to voters within the organized Hamlet of Lone Rock or to the entire R.M.;

4) Directions regarding who has responsibility over enforcement of the duties and maintaining legislative requirements of the *Act* and regulations.

[3] The R.M. countered with its own application seeking:

a) An order validating service on the applicants;

b) An order pursuant to s. 358(4) of the *Act* or Rule 4-22 of *The Queen's Bench Rules* directing the applicants to post no less than $7,500 as security for costs;

c) An order striking portions of the affidavits filed in support of the application;

d) An order striking out the applicant's originating application as being duplicitous and/or an abusive process as an appeal board has been initiated by the Hamlet of Lone Rock pursuant to s. 77 of the *Act* relating to "water, sewer, expenditures and land purchase" which are the same matters as raised in the originating application;

e) Solicitor/client costs due to unreasonable and unfounded allegations made against the R.M. in bad faith.

Background

[4] The applicants depose that Lone Rock has seen a decline in the services provided by the R.M. in the last five years and that the relationship between the R.M. and the organized Hamlet has deteriorated over the corresponding period. More specifically, the applicants allege that the R.M. Reeve, Mr. Glen Dow, announced a termination of water and sewer services to Lone Rock during a Town Hall meeting held August 21, 2018. The applicants believed that the R.M. would be terminating water and sewer services over a two-year period.

[5] In response to the announcement, the residents of Lone Rock met on September 4, 2018 and signed a petition requesting that the R.M. provide a financial audit regarding the finances and expenses pertaining to the Hamlet of Lone Rock. The petition contains 25 signatures all reportedly residents of the Hamlet of Lone Rock. The R.M., relying on s. 140.1(4) of the *Act,* denied that the petition was valid as the petition did not contain the signature of a number of voters equal to one third of the population of the municipality. The applicants rely on s. 132(2) of the *Act* and contend that the petition is valid as it contains the signature of 25 residents which exceeds 15 percent of the population of the Hamlet of Lone Rock.

[6] In November 2018 the Hamlet Board submitted its proposed budget to the R.M. Later that month the Hamlet Board requested the formation of an appeal

board pursuant to s. 77 of the *Act* to address disputes respecting "water, sewer, expenditures and land purchases."

[7] On December 6, 2018 the Hamlet Board submitted an amended budget to the R.M. On January 18, 2019 the R.M. submitted its proposed 2019 budget for Lone Rock to the Hamlet Board. The R.M. and the Hamlet Board agreed to a meeting in February to discuss the proposed Lone Rock budget. The meeting was cancelled. The R.M. alleges it was due to bad weather, an explanation not accepted by the applicants.

[8] On March 3, 2019 the Hamlet Board submitted a third proposed budget to the R.M. On March 21 the R.M. passed a resolution approving a 2019 Lone Rock budget which is significantly different than the proposed budget submitted by the Hamlet Board and is made without consultation with the Hamlet Board.

[9] On April 4, 2019 mediation was proposed resulting in a mediation agreement signed between the R.M. and the Hamlet Board on May 15, 2019. Mediation sessions were held on May 6 and June 6, 2019 but no settlement was reached.

[10] On June 11, 2019 the Hamlet Board sent a resolution to the R.M. requesting a return to annual water and sewer billing for the residents of Lone Rock. On June 27 the R.M. passed the Lone Rock Utility Charge Bylaw which established monthly water and sewer billing. Also on June 27 the R.M. passes a resolution adopting an amended 2019 Lone Rock budget. The R.M. had considered the previous Lone Rock budget proposals, however the R.M. did not approve or adopt the proposed budgets. The R.M. had considered the Lone Rock resolution seeking the utility bills be annual rather than monthly. However, the R.M. decided to proceed with monthly utility bills which it had began mailing out in March 2019.

[11] On July 16, 2019 the R.M. declined a Hamlet Board request to return to a monthly water and sewer billing. The applicants, unhappy with the position taken by the R.M. on the budget and utility billing issues, filed an Originating Application on August 28, 2019 seeking to quash the R.M.'s resolution passed June 27, 2019 respecting the 2019 Lone Rock budget and to quash the Lone Rock Utility Charge Bylaw passed on June 27, 2019.

[12] On September 13, 2019 the Saskatchewan Municipal Board approved the R.M. water and sewer rates pursuant to s. 23(3) of the *Act*.

[13] On October 1, 2019 the R.M. filed its Notice of Application seeking security for costs and requesting that the applicants Originating Application be struck out as being duplicitous and/or an abuse of process as the issues raised in the applicants Originating Notice are matters currently before the Appeal Board.

[14] It is with that basic evidentiary background that I consider the various applications.

The R.M.'s application to strike the originating application as an abuse of process or being duplicitous

[15] The R.M. contends that the applicants have initiated their application pursuant to s. 358 of the *Act* seeking the very same relief as claimed by the Hamlet Board through the Appeal Board process. The R.M. contends that the Appeal Board will be hearing and adjudicating on the issues raised by the applicants in the within proceeding, namely "water, sewer, expenditures and land purchases.". Accordingly, the R.M. contends that the application made by Mr. Ludwig and Mr. Kashuba is either an abuse of process or duplicitous. The R.M. points out that Mr. Ludwig, is the Chairman of the Hamlet Board for the Hamlet of Lone Rock.

[16] The R.M. relies on s. 29 of *The Queen's Bench Act, 1998,* SS 1998, c Q-1.01 which addresses avoiding multiplicity of actions. Section 29 is reproduced as follows:

> Multiplicity of proceedings avoided
>
> 29(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> (a) all issues in controversy between the parties are determined as completely and finally as possible; and
>
> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> (2) Relief pursuant to subsection (1) may be granted either absolutely or on any terms and conditions that a judge considers appropriate.

[17] The R.M. further relies on *Continental Auctions Ltd. v Midway Machine (1973)*, [1979] S.J. No. 179 (QB) where the court stated at para 3:

> 3 Accordingly, I must consider that the first action has not been effectively discontinued and we are faced with a situation where there are two suits claiming similar relief out of the same set of circumstances and in my opinion this constitutes an abuse of the process of the court. In *Earl Poulett v. Viscount Hill* (1893) 1 Ch. 277 at 282, Kay, L.J., said:
>
> > "When an action has been brought by which the plaintiff can recover everything to which he is entitled, he ought not to bring another.".
> >
> > This statement is applicable to the situation prevailing here and in my respectful opinion the second action ought not to have been commenced and accordingly the statement of claim is struck out as prayed by the defendant. The defendant will will have its costs of this application.

[18] The R.M. also relies on *Re MacDonald and Law Society of Manitoba*, 1975 CanLII 1138 (MB QB) where the court declined to hear a case involving parallel proceedings between the same parties where the court stated:

> This application is asking for an extraordinary equitable remedy and it would be undesirable to entertain it at a time when there is another action pending before this same Court, dealing with matters arising out of the same set of facts, in which the affected parties are represented. I, therefore, dismiss this application, but reserve to the application the right to re-apply when the other action has been disposed of.

[19] The cases cited by the R.M. can be distinguished on the basis that the applicants in the present case are not the parties involved in the Appeal Board process. The Appeal Board is a creature of statute commenced by a request made by a Hamlet Board pursuant to s. 77 of the *Act*. In that instance the parties to the process are the R.M. and the Hamlet Board. In the present situation, the applicants are individuals within the definition of s. 358 of the *Act*. Section 358 provides that "... any voter of a municipality, any owner or occupant of property or a business within the municipality or the minister may apply to the court to quash a bylaw or resolution in whole or in part ...".

[20] In essence, the parties in each action are different. The within application is made by two residents of Lone Rock, albeit one of the applicants is the

Chair of the Organized Hamlet Board. Mr. Kashuba is not on the Hamlet Board although he has been significantly involved with the activities of the Hamlet Board notwithstanding that he is not an elected board member. Although there is significant overlap between the actions of the applicants acting in their personal capacity and their involvement in the Organized Hamlet Board, there is not sufficient evidence to establish that the applicants are acting as proxies for the Hamlet Board. Accordingly, I do not find that the applicants are *de facto* representatives of the Hamlet Board making a collateral application to quash decisions of the R.M. That the Organized Hamlet Board would, in its own right lack the standing to make such an application.

[21] I do not find the application pursuant to s. 358 of the *Act* to be either an abuse of process or duplicitous.

Should the within application be stayed pending the decision of the Appeal Board

[22] Under the circumstances, I accept that s. 29 of the *Queen's Bench Act* is intended to avoid multiplicity of proceedings. The appeal process is first in time and has been instituted to address the precise issues raised by the applicants in the within proceeding. I recognize that the parties to the Appeal Board process and the parties in the current application differ. However, in each case the respective applicants seek to overturn decisions made by R.M. or the identical decisions made by the R.M. Accordingly, the application by Mr. Ludwig and Mr. Kushuba pursuant to s. 358 is adjourned *sine die* pending a completion of the Appeal Board process.

The R.M.'s application for security for costs

[23] The R.M. provides for an order directing the applicants to pay $7,500 as security for costs pursuant to either s. 358(4) of the *Act* or pursuant to Rule 4-22 of the Rules of Court. The affidavit of Darren Elder filed in support of the R.M.'s application simply states that the R.M. will incur legal expenses in excess of $7,500 to respond to the application to quash R.M. resolutions, bylaws or decisions.

[24] Section 358(4) states as follows "A judge of the court may require an applicant to provide security for costs in an amount and manner established by the judge." This provision provides little guidance to the court regarding the circumstances under which an order for security for costs be granted. Rule 4-22 and 4-24 is reproduced as follows:

> **4-22**(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court:

(a) has discretion respecting security for costs; and

(b) may order security for costs against any party to a proceeding, including a party who is ordinarily resident in Saskatchewan.

(2) The Court has discretion to determine the amount and form of security for costs.

4-24 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:

(a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Saskatchewan;

(b) the ability of the respondent to the application to pay the costs award;

(c) the merits of the action in which the application is filed;

(d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;

(e) any other matter the Court considers appropriate

[25] A review of the relevant case authority respecting Rule 4-24 suggests that an order for costs is generally made in one of two circumstances. The first situation warranting an order for costs is the ability of an unsuccessful litigant to pay an order for costs. The second is where an applicant can establish that there is a good reason for the court to believe that the pleadings or position taken by a litigant is without merit. However, even where a litigant is impecunious, the court is reluctant to order costs where the claim has merit. The R.M.'s evidence does not establish that the applicants are impecunious or lacks merit.

[26] Although s. 358(4) is silent with respect to the circumstances under which costs will be ordered, I see no reason not to adopt principles applicable to a Rule 4-22 application to the application under the *Act*. An application for security for costs is not the appropriate remedy where a party alleges that a claim is without merit. An application to strike, as the R.M. has done in this case, is the appropriate remedy. The R.M. has provided no evidence that the applicants are impecunious or otherwise unable to satisfy an order for costs. The evidence is to the contrary, namely the applicants are property owners within the R.M. and an award of costs would be enforceable against them. Accordingly, the R.M.'s application for an order for security for costs is dismissed.

The application to set aside a separate water and sewer billing for residents of Lone Rock pursuant to s. 23(3) of *The Municipalities Act*

[27] For the same reasons stated in respect of the application pursuant to s. 358 of the *Act*, the application pursuant to s. 23(3) of the *Act* is adjourned *sine die* pending completion of the Appeal Board process.

The application for directions regarding scope of the petition and the application as to who has responsibility over enforcement of the *Municipalities Act* and regulations

[28] The request respecting who has responsibility over enforcement of the duties and maintaining legislative requirements of the *Act* or *Regulations* is so broad is to be meaningless. Accordingly, the application is dismissed.

[29] The application respecting the provision of s. 132(2) of the *Act* is also not properly before the court. The applicants did not apply for an order declaring the petition to be valid. Rather, the application is focused on seeking the court's interpretation of s. 132(2). In the absence of any request for a specific relief regarding the court's rule on the validity of the petition, it is inappropriate for the court to make any ruling in the abstract. As stated by the Alberta Court of Appeal in *Griffiths McBurney & Partners v Ernst & Young YBM Inc.*, 2000 ABCA 284 the court stated at para 46 as follows:

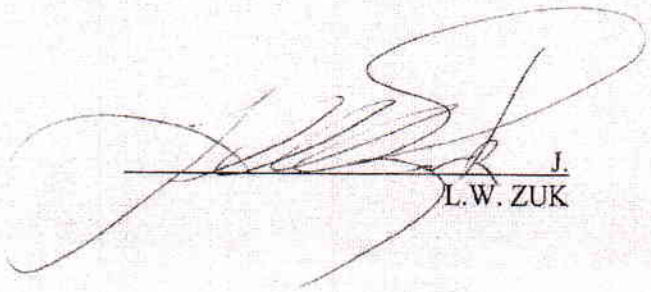
> [46] Another circumstance in which the court should decline to provide directions is when the receiver is effectively using the court as a legal adviser. That circumstance is present here. The Receiver has its own counsel to whom it can turn for legal advice and should not turn to the court for such advice.

[30] Accordingly, the application for the court to comment on the scope of the petition is dismissed.

Costs

[31] The R.M. successfully applied to strike portions of the affidavits filed in support of the application. The R.M. shall have costs against the applicants, jointly and severally, in the amount of $200 payable forthwith.

[32] The R.M. was unsuccessful in its application for security for costs and was partly successful in its request to have the applications made by the applicants struck. Accordingly, each party shall bear their own costs to date.



J.
L.W. ZUK