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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 356 of 1991

BETWEEN:

SAMANTHA YOW by her litigation guardian RONALD YOW
Plaintiff

AND:

NORTHERN TERRITORY GYMNASTIC ASSOCIATION INC.
Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 2 October 1991)

On 1 October I refused to grant the interlocutory relief sought by the plaintiff in her Summons of 30 September 1991. Mr Farquhar then sought that the successful defendant be awarded its costs of that application. Mr Reeves made no submissions as to costs. I reserved the question for consideration and rule upon it today.

Order 63 of the Supreme Court Rules provides for costs. While the award is discretionary (Rule 63.03(1)) the general rule is that each party must bear its own costs of an interlocutory application (Rule 63.18). Any costs awarded in respect of interlocutory applications are in general not to be taxed until the conclusion of the litigation; see Rule 63.04(3)(a).

In *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, 29 May 1990) Martin J discussed the general principles applicable to the award of costs on interlocutory applications. His Honour noted the "radical departure" from previous practice evinced by Rules 63.18 and 63.04(3)(a); they involved a "reversal of thinking about costs in interlocutory matters." The reasons of policy which gave rise to that departure meant that:-

> " - - there must be something exceptional about the circumstances of the interlocutory application under consideration to lead the Court, in the exercise of its discretion, to make an order as to costs, taxation and payment."

His Honour went on:-

"Given the tenor of the Rules, it would not be just to make interlocutory orders for costs, or, if made, to order that they may be taxed earlier than completion of the proceedings, with a view to punishing the unsuccessful party. To do so may engender a reluctance in parties to properly ventilate their problems during the pre-trial process. What is required is an approach which seeks to have a successful party reimbursed the expense of interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably; or which are unnecessarily burdensome; or which are made at a time, such as here, when that party has been deprived of the value of the work done in preparation of his case for trial. In such instances, and the list is not intended to be definitive or complete, it may well be within the Court's discretion to exercise the power to override the principles established by the Rules.

Costs in interlocutory matters no longer follow success. No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the application or resistance [of that party], as the case may be, are reasonable. However, if such

application or resistance [by the unsuccessful party] is without real merit, as if (sic) often the case, the successful party should not have to bear his [own] costs.

As to taxation and payment of interlocutory costs ordered to be paid by one party to another, a just approach to take is to consider whether the successful party ought to have reasonably anticipated interlocutory proceedings of the kind in question. If so, then he should have anticipated bearing the expense, at least to the conclusion of the proceedings, and not reckoned on having it paid for by the other party. If, however, the kind of interlocutory application or the number of them could not have been so anticipated, then there may be a better case for ordering that the successful party's costs be taxed and paid earlier." (emphasis mine).

In *Milingimbi Education and Cultural Association Inc v Davies* (unreported 12 October 1990), I indicated that

I "respectfully agree with those general observations." The guidelines his Honour provides cannot of course limit the general discretion of the Court.

Applying this general approach, I consider that the application of 30 September 1991 was "without real merit", and accordingly the award of the costs of the application falls to be decided by the exception to the general approach, adumbrated by Martin J. Accordingly, I consider that the successful defendant should have its costs of the application of 30 September 1991.

The outline of this type of interlocutory application usually brings to an end the entire action. The principle of "reasonable anticipation" referred to by Martin J in relation to Rule 63.04(3)(a) is not, in my view, of practical application in such a case. I think the better approach in this type of case is to complete matters immediately; accordingly, the defendant may tax its costs forthwith.

Orders accordingly.
