Northern Territory of Australia v Couzens [2004] NTSC 50

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v COUZENS, SHARON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 7 of 2004 (20304305)
DELIVERED:	17 SEPTEMBER 2004
HEARING DATES:	13 SEPTEMBER 2004
JUDGMENT OF:	ANGEL J

CATCHWORDS:

PROCEDURE – COSTS

Costs of the appellant refused after unsuccessful application by respondent – principles to be applied under s 24(3) Crimes (Victims Assistance) Act.

Crimes (Victims Assistance) Act, s 24(3)
Interpretation Act, s 62B

Donald Campbell & Co v Pollak [1927] AC 732, applied

REPRESENTATION:

Counsel:

Appellant:	Mr B. O'Loughlin
Respondent:	Ms V. Farmer

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Withnall Maley & Co

Judgment category classification:	B
Judgment ID Number:	ang200407
Number of pages:	8

Ang200407

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Couzens [2004] NTSC 50
No. LA 7 of 2004

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

SHARON COUZENS
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 17 September 2004)

[1] This is an appeal pursuant to s 19(1) Local Court Act. It is from a decision of the Local Court at Darwin on 15 March 2004 refusing to order costs in favour of the appellant. The appellant unsuccessfully applied for costs consequent upon the Court's dismissal of the respondent's application pursuant to s 5 Crimes (Victims Assistance) Act for an assistance certificate.

[2] The grounds of appeal are twofold:

(a) that the learned Magistrate misdirected himself when he referred to the Attorney–General's Second Reading Speech in order to interpret s 24(3) of the Crimes (Victims Assistance) Act; and

(b) that the learned Magistrate wrongly concluded that the appellant was not entitled to its costs following dismissal of the respondent's application.

[3] Section 24(3) Crimes (Victims Assistance) Act provides:

> "If the Court dismisses or strikes out an application under section 5, the Court may order that the applicant must pay all or part of the costs incurred by the Territory in respect of the application."

[4] Following submissions as to costs the learned Magistrate reserved his decision. He delivered his reasons orally on 15 March 2004. Having pointed out that s 24(3) was added by amendment in 2002 and that prior to that amendment there was no power under the Act to order an unsuccessful applicant to pay the costs of the Territory, his Worship commented that the amendment represented "a substantial departure from the earlier costs regime". The transcript records his Worship as follows:

> "I have found that it is permissible to have regard to the second reading speech in relation to the amendment bill, I rely upon section 52B (sic) of the Interpretation Act and during the second reading speech, the Attorney–General stated that new section 24(3) will allow the court to award costs against an applicant if the court dismisses or strikes out the application.
>
> It goes on to say 'currently there is no provision discouraging a person from making a false or vexatious application. Clearly a person who abuses the legal system should not be permitted to get away with it without implication'. These statements indicate the amendment was made primarily to discourage false or vexatious applications but it is clear that the discretion to order costs is not confined to those circumstances in my opinion.
>
> Had the legislature intended to confine the discretion in that way it would have simply circumscribed the discretion by appropriate legislative language. In my opinion, the discretion is much broader, the question arises how wide is that discretion. I think it's clear that the discretion is not governed by the general

principle that costs should follow the event. In other words, it's not the case that an unsuccessful applicant should be ordered to pay the costs of the other party in every case and I think that's clear from the tenor of the second reading speech.

Bearing in mind that however, that section 24(3) represents a dramatic departure in the earlier cost regime, I do not believe that the legislature intended that discretion be exercised in accordance with the principle costs should follow the event. So just a question of determining what strictures are imposed on that discretion. It seems to me that if the claim is vexation, frivolous, or oppressive, or scandalous, then it would seem appropriate to award costs either in full or in part against the unsuccessful applicant.

Such claims should clearly be actively discouraged by the imposition of the appropriate costs orders. At the same time, the discretion should not be exercised in such a way as to discourage injured persons pursuing bona fide applications for victims assistance, it's my view that that public policy permeates the provisions of section 24(3) as much as the competing public policy which is against the pursuit of vexatious, frivolous, oppressive or scandalous applications.

I think it's important to bear in mind, or to keep in mind that the subject legislation is beneficial legislation, but at the same time, those who abuse the legal system aren't established by that legislation ought not to be protected from cost orders for the application as struck out and dismissed. (sic) So again, I think that the beneficial nature of the legislation goes a long way towards confining and structuring that general discretion conferred by section 24(3).

The question that now arises is whether the present application falls within any of the categories that I mentioned, and whether the circumstance of the present case warranted an order being made against the applicant on account of her failure to substantiate her claim at the end of the day. …".

His Worship went on to say:

"It is a borderline case, but I must say that I have some difficulty for public policy reasons penalising the applicant in this case, there will be grey areas in this area of the law, but this falls within a grey area being beneficial legislation, I'm inclined to the view that it would be inappropriate to order costs against the applicant in this case, I think that one should basically be looking at

some misconduct on the part of the application (sic) and I think that probably is a guiding principle.

Of course that can manifest itself in a variety of ways, of frivolous, oppressive, scandalous claims and somebody was acting purely mala fides but applying that guiding principle, I don't see that this case falls squarely within that category and so for those reasons I do not grant the application for costs."

[5] It appears the learned Magistrate was wrongly recorded as referring to s 52B Acts Interpretation Act for he plainly meant s 62B. He did not analyse that section. One of the appellant's complaints is that the learned Magistrate ought to have had no resort to s 62B at all.

[6] It is convenient to set forth s 62B of the Interpretation Act.

62B.Use of extrinsic material in interpreting Act

(1) In interpreting a provision of an Act, if material not forming part of the Act is capable of assisting in ascertaining the meaning of the provision, the material may be considered –

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when –

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting subsection (1), the material that may be considered in interpreting a provision of an Act includes –

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

> (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before the Legislative Assembly before the time when the provision was enacted;
>
> (c) any relevant report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the time when the provision was enacted;
>
> (d) any treaty or other international agreement that is referred to in the Act;
>
> (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of the Legislative Assembly by a Minister before the time when the provision was enacted;
>
> (f) the speech made to the Legislative Assembly by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in the Legislative Assembly; and
>
> (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section.

[7] As can be seen from the terms of s 62B, resort to material not forming part of the Act may only be considered if it is capable of assisting in ascertaining the meaning of a provision and in order to confirm the meaning of the text read literally or to determine the meaning of an ambiguous or obscure provision or to determine the meaning where the literal meaning leads to a manifestly absurd or unreasonable result. The learned Magistrate's reasoning does not indicate to which aspect of s 62B he was resorting.

[8] Section 24(3) Crimes (Victims Assistance) Act is neither ambiguous nor obscure. The Court is given a discretion to order an unsuccessful applicant

to pay all or part of the costs incurred by the Territory in the event an application for a s 5 certificate is either dismissed or struck out. The learned Magistrate, it may be, thought the provision is ambiguous in the sense that how the discretion is to be exercised in any particular case is not spelt out by the Legislature. Plainly he thought the ordinary rule that costs follow the event in the absence of some circumstance such as failure of success on an issue or some disqualifying conduct on the part of the successful party was inapplicable and that some "misconduct" on the part of an unsuccessful applicant "probably is a guiding principle".

[9] In my opinion the learned Magistrate erred both in having resort to s 62B of the Interpretation Act and of declining to order costs in favour of the appellant against the respondent. Section 24(3) of the Act plainly confers a discretion upon the Court to order that an applicant whose application has been dismissed or struck out should pay all or part of the costs incurred by the Territory in respect of the application. It permits what was previously unpermitted, that is, a costs order against an unsuccessful applicant in favour of the Territory. Nothing in the Second Reading Speech indicates otherwise or hints that the discretion is somehow fettered.

[10] It has been said that there is only one immutable rule in relation to costs, and that is that there are no immutable rules: see *Taylor v Pace Developments Ltd* [1991] BCC 406 at 408, [1991] TLR 228 per Lloyd LJ. See also *Symphony Group Plc v Hodgson* [1994] QB 179 at 192, per Balcombe LJ. The leading case remains *Donald Campbell & Co v Pollak*

[1927] AC 732 where Viscount Cave LC said at 811–12 that a successful party:

> "… has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the [unsuccessful party]; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case."

It seems to me that the exercise of a discretion under s 24(3) is an absolute and unfettered discretion to be exercised judicially according to the circumstances of the individual case. In the ordinary course it ought not to be exercised against the Territory except for some reason connected with the case bearing particularly in mind that the purpose of a costs order is to alleviate the cost of litigation, not to penalise the person against whom the order is made. As can be seen from the reasons of the learned Magistrate cited above, he had "some difficulty for public policy reasons penalising the applicant in this case …". In this I think he was in error, as was he in error also in looking for some misconduct on the part of the unsuccessful respondent before contemplating an order for costs against the respondent. In my opinion the learned Magistrate exercised his discretion according to wrong principle and that this Court on appeal should therefore interfere: cf *McCauley v McCauley* (1910) 10 CLR 434 at 455.

[11] In the course of his reasons the learned Magistrate, a number of times, emphasised that the Crimes (Victims Assistance) Act was remedial

legislation. This Court was referred to what was said in *Woodruffe v Northern Territory of Australia* (2000) 10 NTLR 52 at 62, but however remedial or beneficial the legislation may be that gives no cause to restrict the unfettered discretion as to costs appearing in s 24(3). In this regard it is to be noted that other beneficial legislation such as the Work Health Act and the Motor Accidents (Compensation) Act – see Rule 11 of the Motor Accidents (Compensation) Appeal Tribunal Rules – provide for cost orders against unsuccessful parties. Undoubtedly the present legislation confers benefits and should not be construed restrictively but the Act's remedial character is no reason to confine or read down s 24(3) thereof.

[12] There being no suggestion of conduct on the part of the appellant which disqualifies it from obtaining a costs order in its favour, the respondent's application having been dismissed, a proper exercise of the Court's discretion would have been to order that costs follow the event.

[13] For these reasons the appeal is allowed, the order of the Local Court refusing costs is set aside and it is ordered that the respondent pay the costs of the appellant in respect of the respondent's application dismissed on 10 October 2003. The appellant not seeking its costs of the appeal, there will be no order as to the costs of the appeal.

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