

A'Hang v Northern Territory of Australia & Ors [2004] NTSC 51

PARTIES: JACK ARTHUR A'HANG

v

NORTHERN TERRITORY OF AUSTRALIA
and
MIKE FOSTER, ZADDOCK JOHNSON,
DUANE FRASER & DEREK FOSTER

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: 24/2002 (20206131)

DELIVERED: 28 September 2004

HEARING DATES: 12 August 2004

JUDGMENT OF: THOMAS J

REPRESENTATION:

Counsel:

Appellant: M Lennie
Respondent: J Stirk

Solicitors:

Appellant: Messrs Morgan Buckley
Respondent: Messrs Povey Stirk

Judgment category classification: C

Judgment ID Number: tho200410

Number of pages: 9

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

A'Hang v Northern Territory of Australia & Ors [2004] NTSC 51
No. 24/2002 (20206131)

BETWEEN:

JACK ARTHUR A'HANG
Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
First Respondent

and

**MIKE FOSTER
ZADDOCK JOHNSON
DUANE FRASER
DEREK FOSTER**
Second Respondents

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 28 September 2004)

- [1] On 12 June 2003, I delivered my reasons for judgment in which I allowed an appeal from a decision of the then Deputy Chief Magistrate with respect to three claims under the Crimes (Victims Assistance) Act. With respect to the fourth claim which was also the subject of an appeal, I dismissed the appeal and confirmed the assistance certificate issued by the then Deputy Chief Magistrate.

- [2] I made a further order in which I granted the parties liberty to apply on the question of costs. The parties have not come to an agreement on the issue of costs. The parties applied for this matter to be listed before me to enable them to present their respective argument as to the appropriate order for costs.
- [3] It is not in dispute that costs normally follow the event and that the appellant is entitled to an order for costs.
- [4] Ms Lennie, who appeared on behalf of the appellant, seeks an order that the respondent pay the appellant's costs of the proceedings to be agreed or taxed on an indemnity basis.
- [5] Mr Stirk, who appeared for the respondent, had substantially three reasons for seeking an alternative order. These were as follows:
1. At the hearing of the appeal the appellant made application for leave to appeal and sought an order extending the time for filing the appeal which was filed out of time. It is submitted on behalf of the respondent that in granting the application for leave to appeal, the appellant was seeking an indulgence arising from the appellant's own failure to file the notice of appeal within time. Accordingly, the appellant should not, on the argument proffered by the respondent, have costs with respect to the application for leave to appeal and extension of time to file a notice of appeal.

2. Mr Stirk submitted that it is common ground that this Court was asked to review four separate awards made under the Crimes (Victims Assistance) Act. The essential basis of the appeal was that the quantum awarded in respect of each claim was manifestly inadequate. The appellant was successful with respect to three of the awards. The appellant was not successful with respect to the fourth award. The submission on behalf of the respondent is that the appellant is only entitled to a percentage of his costs on the basis that he was not wholly successful.
3. The submission by counsel for the respondent is that it is not appropriate to award costs on an indemnity basis. I was referred to Order 63 of the Supreme Court Rules in particular Rule 63.01, Rule 63.27 and Rule 63.29.

[6] I shall deal with each of these arguments:

1. **At the hearing of the appeal the appellant made application for leave to appeal and sought an order extending the time for filing the appeal which was filed out of time. It is submitted on behalf of the respondent that in granting the application for leave to appeal, the appellant was seeking an indulgence arising from the appellant's own failure to file the notice of appeal within time. Accordingly, the appellant should not, on the argument proffered by the respondent, have costs with respect to the application for leave to appeal and extension of time to file a notice of appeal.**

[7] With respect to the application for extension of time to lodge the notice of appeal, I refer to Rule 63.11(5) of the Supreme Court Rules which provides as follows:

“ (5) Where a party applies for an extension or abridgement of a time fixed by these Rules or by an order fixing, extending or abridging time, he shall pay the costs of and occasioned by the application.

[8] In the matter before this Court the application for an extension of time was heard at the same time as the merits of the appeal. In filing the notice of appeal the appeal was four days outside the 28 day time limit prescribed by s 19(1)(a) of the Local Court Act. The respondent opposed the granting of an extension of time. The respondent did not claim that it suffered any prejudice due to this delay. The appellant also had to satisfy the Court that the failure to institute the appeal within the period of 28 days was due to exceptional circumstances. The argument between the parties essentially dealt with this second issue. The appellant was successful on its arguments, supported by affidavit evidence. The respondent could have taken the alternative course of raising no objection to the application for extension of time to file the notice of appeal. This would have reduced the time taken in arguing the appeal. With respect to the application for leave to appeal and the appeal itself, I will make an adjustment in the overall award for costs as I recognise the respondent did have the right to challenge the appellant's reasons for failing to institute the appeal within 28 days and it was the appellant seeking an indulgence.

2. Mr Stirk submitted that it is common ground that this Court was asked to review four separate awards made under the Crimes (Victims Assistance) Act. The appellant was successful with respect to three of the awards. The appellant was not successful with respect to the fourth award. The submission on behalf of the respondent is that the appellant is only entitled to a percentage of his costs on the basis that he was not wholly successful.

[9] This second argument raised by the respondent relates to submissions that because the respondent was successful in respect to the appeal on one of the four claims under the Crimes (Victims Assistance) Act the appellant should only be awarded 50 per cent of his costs.

[10] When the merits of the appeal were argued, the substantial issue was Ground 1.1:

“1. The Learned Stipendiary Magistrate erred by:

1.1 Failing to make an assessment of compensation for the psychological injury suffered by the Applicant with regard to each individual claim.”

[11] The appellant succeeded on this ground of appeal which substantially affected the award in respect of the first claim but did also have some significance with respect to the remaining three claims.

[12] I do not agree with the submission made by Mr Stirk to the effect that because there were four claims I should assess costs on the basis that each claim represented 25 per cent of the arguments for the purpose of costs. As a consequence of the appeal, which was essentially on the basis that the awards were manifestly inadequate, the awards were increased from \$1500

to \$25000 on the first claim. With respect to the second claim, the award was increased from \$4000 to \$8000. On the third claim, the award was increased from \$300 to \$1500.

[13] The award of \$2500 made by the Deputy Chief Magistrate with respect to the fourth claim was confirmed.

[14] Overall the total of the awards were increased from \$8300 to \$37000.

[15] The respondent was successful with respect to the fourth claim. Therefore there should be an adjustment made to reflect this in the order for costs. However, it is not a fair apportionment of costs to treat each of the four claims as representing 25 per cent of the costs. The appellant was successful on the substantial issue and there should only be a minor adjustment to the order for costs because the respondent was successful on the fourth claim. The fourth claim occupied a small portion of the time spent in argument before the Court. I would reduce the order for costs to 85 per cent. In addition, I would reduce the order for costs by a further five per cent to allow for the time taken to argue the application for extension of time.

[16] For these reasons I consider the appellant is entitled to an order that the respondent pay 80 per cent of the appellant's costs.

3. **The submission by counsel for the respondent is that it is not appropriate to award costs on an indemnity basis. I was referred to Order 63 of the Supreme Court Rules in particular Rule 63.01, Rule 63.27 and Rule 63.29.**

[17] Counsel for the appellant seeks an order that costs be awarded on an indemnity basis. Rules 63.29 and 63.30 of the Supreme Court Rules state as follows:

63.29 Where indemnity basis applicable

- (1) Subject to this Order, the Court may order that costs be taxed on the indemnity basis.
- (2) Where the Court makes an order for –
 - (a) the payment to a party of costs out of a fund; or
 - (b) the payment of costs to a party who sues or is sued as trustee,

subject to rule 63.30, the costs shall be taxed on the indemnity basis.

63.30 Party as trustee

Where a party who sues or is sued as trustee is entitled to be paid costs out of a fund which he holds in that capacity, the costs shall, unless the Court otherwise orders, be taxed on the indemnity basis.”

[18] It is the contention of counsel for the appellant that the Crimes (Victims Assistance) Act provides for a “fund” and that accordingly this Court has the power to order costs on an indemnity basis. I was referred to a decision of Riley J in *Northern Territory of Australia v Piper* 112/02 delivered 20 August 2002 as authority for the proposition that there is a “fund” provided for in the provisions of the Crimes (Victims Assistance) Act.

[19] Mr Stirk, on behalf of the respondent, opposes such an order. The argument advanced for the respondent is that the Crimes (Victims Assistance) Act has

not established a “fund” as contemplated by Order 63.29 of the Supreme Court Rules. Mr Stirk argues that this order only applies in respect of a “fund” which is administered by a trustee and that is not the position in this case.

[20] The Crimes (Victims Assistance) Act does establish a “fund”. Under s 4 “Fund” is defined as follows:

“ ‘Fund’ means the Victims' Assistance Fund established by section 25A;”

[21] Section 25A of the Crimes (Victims Assistance) Act provides as follows:

- “(1) There is established a fund to be known as the Victims' Assistance Fund.
- (2) The Fund shall consist of money –
 - (a) appropriated for the purposes of the Fund to the department for the time being principally responsible under the Minister for the administration of this Act;
 - (b) paid into the Fund under subsection (3);
 - (c) recovered by the Territory under this Act; and
 - (d) paid into the Fund in pursuance of any other Act.
- (3) In each financial year the prescribed proportion of the aggregate amount paid into the Consolidated Revenue Account by way of fines, and the total amount of the levy imposed under section 25B, shall be paid into the Fund.
- (4) The money of the Fund shall be credited into a fund maintained within the Agency Operating Account for that purpose.
- (5) A payment made after the commencement of the *Crimes Compensation Amendment Act 1989* under this Act or the *Criminal Injuries (Compensation) Act* as continued in force by section 28(1) shall be debited to the Fund.”

[22] On my reading of the legislation and supported by the decision of *Northern Territory of Australia v Piper* (supra) the Crimes (Victims Assistance) Act has established a “fund” and accordingly under the provision of Order 63.29(2)(a) of the Supreme Court Rules, this Court has the power to award costs on an indemnity basis.

[23] For these reasons I make the following orders:

1. I make an order that the respondent pay 80 per cent of the appellant’s costs as agreed or taxed.
2. I make an order pursuant to order 63.29(2)(a) that these costs be taxed on the indemnity basis.
3. With respect to the argument before the Court on the question of costs, I note that Mr Stirk advised the Court that the respondent had offered to pay 50 per cent of the appellant’s costs. The appellant was not satisfied with this and the matter came back before the Court. The appellant was successful in achieving an order for 80 per cent of his costs.

Accordingly, there is an order that the respondent pay the appellant’s costs of the application, which if it does proceed to taxation, be taxed on the indemnity basis.
