Step v Stokes [2009] NTSC 59

PARTIES:	VA'CLAV STEP
	v
	VICKI B STOKES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 4 of 2009 (20618554)
DELIVERED:	16 November 2009
HEARING DATES:	15 & 23 October 2009
JUDGMENT OF:	OLSSON AJ
APPEAL FROM:	LOCAL COURT OF THE NORTHERN TERRITORY

CATCHWORDS:

PROCEDURE – costs - order for security for costs - application by a respondent to an appeal from the Local Court at Darwin - impecunious appellant - little apparent prospect of success of appeal - "special circumstances" as required by *Northern Territory Supreme Court Rules* r 83.11(1) and r 83.11(2) established - application allowed.

Northern Territory Supreme Court Rules r 83.11

Ayyoush v Samin and Adjrun (Supreme Court of Northern Territory, unreported 18 May 1994, Kearney J [7]); *Loizos v Carlton & United Breweries* (1997) 113 FLR 239, considered.

Iskander and Another v Merpati Nusantara Airline [No 2] (2006) 16 NTLR 22, distinguished.

REPRESENTATION:

Counsel:

Appellant:	In person
Respondent:	T Anderson

Solicitors:

Appellant:	
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	ols200908
Number of pages:	11

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

Step v Stokes [2009] NTSC 59
No LA 4 of 2009 (20618554)

BETWEEN:

VA'CLAV STEP
Appellant

AND:

VICKI B STOKES
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 16 November 2009)

Introduction

[1] This is an application by a respondent to an appeal from a judgment of the Chief Magistrate constituting the Local Court at Darwin for an order that the appellant give security for its costs in relation to the appeal, in the sum of $20,760.

[2] The present application relates to a civil claim that was initiated in the Local Court by the appellant against the respondent. In those proceedings he sought general, aggravated and exemplary damages from the respondent. He alleged that the respondent had committed the tort of misfeasance in public

office with malicious intent, causing him intellectual injury and loss of opportunity. He further claimed that the respondent had defamed him.

[3] Following a lengthy trial, the Chief Magistrate dismissed both claims. She published lengthy and definitive reasons for so doing on 23 April 2009.

[4] The appellant filed a notice of appeal against the decision of the learned Chief Magistrate. This was subsequently amended.

[5] In its amended form, the notice of appeal asserts 11 specified grounds of that appeal. In brief, these are:

(1) That the Chief Magistrate conducted the trial in a way unfair to the plaintiff;

(2) That she erred in law, because her decision was against the evidence and the weight of the evidence;

(3) That she erred in law, because she based her decision in part on inadmissible evidence (hearsay) and on false evidence;

(4) That she erred in law because she refused to admit evidence that the plaintiff attempted to tender, some of which had a potential to decide the case in favour of the plaintiff;

(5) That she erred in law because she refused the plaintiff's application to reopen his case, even though the interests of justice plainly demanded it;

(6) That she erred in law when she considered discretion of the principal of a school to enrol students;

(7) That she erred in law "when deciding plaintiff's defamation claims";

(8) That she erred in law because she found the defendant's defamatory statements were made under qualified privilege. Alternatively, she erred in law because she found no evidence that the defendant published her defamatory statements maliciously;

(9) That she erred in law because she found that the defamatory statements made by the defendant about the plaintiff were not capable of defamatory meaning;

(10) That she erred in law because she found that the defamatory statements made by the defendant about the plaintiff were substantially true; and

(11) That she erred in law because she held that the plaintiff's reputation could not be damaged by the defendant's defamatory statements.

[6] Those specified grounds were amplified by certain particulars pleaded in the amended notice of appeal and were considerably fleshed out, in certain respects, in the quite extensive written and oral submissions made to me in relation to this application. It is unnecessary to traverse that material in extenso in these reasons. I have carefully considered it all.

[7] The applicant seeks to prosecute the present application on the grounds that:

(1) The appellant is plainly a person of no financial substance and would clearly have no capacity to pay the costs of an unsuccessful appeal, if ordered against him; and

(2) The appeal is vexatious, in that it is sought to be prosecuted on grounds that either patently do not enliven the provisions of s19 of the Local Court Act or are clearly untenable.

Relevant statutory provisions and legal principles

[8] I take as my commencement point, the provisions of s19 of the Local Court Act. This specifically stipulates that an appeal may only be made to the Supreme Court against a final order of the Local Court on a question of law. This Court has no jurisdiction to entertain any appeal other than in relation to what may properly be categorised as questions of law.

[9] The present application is founded on the provisions of r 83.11 of the Northern Territory Supreme Court Rules. That is expressed in the following terms:

> "(1) If a tribunal, a decision of which is the subject of an appeal, has power to award costs in respect of proceedings before it, the Court may, in special circumstances, order that such security as it thinks fit be given for the costs of the appeal.
>
> (2) Subject to sub rule (1), no security for the costs of an appeal to the Court is required."

[10] It will, at once, be noted that the power to order the provision of security for costs is expressly conditioned on the existence of "special circumstances".

Rule 83.11(2) renders it apparent that the general principle is that security for costs is not to be ordered in the usual course, absent demonstration of the existence of such circumstances.

[11] This being so, the present applicant bears the onus of establishing the existence of such circumstances[1].

[12] Once special circumstances have been demonstrated, the Court has an unfettered discretion as to whether or not an order for security is appropriate[2].

[13] One matter for consideration is the impecuniosity of the appellant[3]. However, that factor does not *necessarily* mandate an order for security[4], although it is certainly a relevant consideration.

[14] As was pointed out by Kearney J[5], even if special circumstances are demonstrated, any exercise of discretion requires the Court to have regard to the nature of the appeal and the prospects of its success and be careful to avoid the possibility of frustration of an apparently genuine appeal that, on the face of it, raises matters of substance.

[15] It is plain on the authorities that an important matter in assessing whether or not special circumstances exist is a consideration of whether, in addition to any issue of impecuniosity, a proposed appeal, on the face of it, has

---

[1] *Ayyoush v Samin and Adjrun* (NTSC, unreported 18 May 1994, Kearney J [7]).
[2] *Loizos v Carlton & United Breweries* (1997) 113 FLR 239.
[3] *Cf Iskander and Another v Merpati Nusantara Airline* [No 2] (2006) 16 NTLR 22.
[4] *Ayyoush v Samin and Adjrun* (NTSC, unreported 18 May 1994, Kearney J [10] – [12]).
[5] Ibid [12].

reasonable prospects of success, in the sense that the grounds of appeal raise issues of apparent substance, that appear fairly arguable.

The merits of the application

[16] The affidavit in support of the application establishes that a search of the Integrated Land Information System discloses that there is no record of any real property owned by the appellant and also that he has declined to reveal to the applicant any details of his capacity to meet any order for the costs of the appeal, if such an order was made against him.

[17] I took the appellant, in the course of submissions to me, to indicate that he is a man of very modest means. He is currently a full-time university student in receipt of an Austudy allowance as his only source of income, he lives in the bush in a simple style, and does not have assets of great substance. As he put it, his lifestyle is such that his needs are modest.

[18] Accordingly, I am prepared to infer that he is, in fact, impecunious in the relevant sense and would not have the ability to satisfy an order to pay the costs of the present appeal, if he was ordered to do so.

[19] In the course of submissions, I was taken at some length through the various grounds of appeal relied on and the appellant's written submissions clearly identify the issues that he seeks to agitate on his appeal.

[20] As a generalisation it must be said that, in so far as the appeal seeks to impugn the findings of the learned Chief Magistrate, it essentially seeks to

do so with regard to certain procedural aspects of the trial and the merits arising on the evidence, rather than on the footing that she in some way allegedly erred in legal principle in addressing the two causes of action.

[21] A study of the reasons published by the learned Chief Magistrate reveals that she undoubtedly addressed the salient authorities bearing on the two causes of action and correctly identified the relevant principles of law established by them. Indeed, it has not been asserted to the contrary.

[22] It is both unnecessary and inappropriate that I seek to address the substance of the grounds of appeal sought to be relied on by the appellant in detail. It will suffice if I simply refer to them in general, conceptual terms.

[23] As to Ground 1, there is difficulty in marrying up the appellant's written submissions with the particulars expressed in the amended grounds of appeal. Those particulars seek to complain a wide variety of procedural aspects related to the conduct of the trial, during which the Chief Magistrate had the unenviable task of presiding over a lengthy and complex hearing, with the plaintiff conducting his case as a litigant in person.

[24] Whilst it is true that, if sustainable on the merits, various of the matters complained of are capable of mounting to issues of law, many of them appear to relate to somewhat peripheral aspects and others, on the face of them would appear to be difficult to sustain as significant issues, or at all, particularly where they relate to procedural/evidentiary aspects; and also

because, prima facie, there does not appear to be obvious error in most instances.

[25] The second ground of appeal does not raise a question of law at all. It is no more than an attempt to have the appellant review the evidentiary findings made by the learned Chief Magistrate on the merits, as on an appeal by way of re-hearing.

[26] In so far as the third ground seeks to complain of false evidence having been given, it does not promote or raise any issue of law in the relevant sense. To the extent that it complains of the inappropriate admission of hearsay evidence, it manifestly misinterprets the basis on which the relevant evidence was admitted. It was, in the main, led not in proof of the matters referred to, but rather to establish the state of mind of the applicant at the time -- an issue highly relevant to the pleaded causes of action. On the face of it, this ground of appeal misconceives that situation.

[27] Ground four complains of a failure to admit evidence of certain communications passing between the Ombudsman and the plaintiff, from a Mr Craig Drury to the Anti-Discrimination Commission and the decision given by another Magistrate in the same proceedings. All that need be said concerning those matters is that it is well nigh impossible to see how such materials could properly have been admitted in accordance with the rules of evidence, or as relevant.

[28] The appellant next seeks to complain, in Ground 5, that the Chief Magistrate inappropriately declined to permit him to reopen his case by authenticating a letter written by Mr Drury to the Anti-Discrimination Commission and a letter written by the Ombudsman to the present applicant. Once again, it is difficult to perceive how the learned Chief Magistrate could properly have done other than adopt the stance that she did.

[29] Proposed Ground 6 of the amended notice of appeal seeks to assert that the learned Chief Magistrate erred in law "when she considered discretion of the principal of the school to enrol students".

[30] As I understand the points sought to be argued, it is that, on the evidence led at trial, the learned Chief Magistrate ought to have concluded that the applicant was bound to enrol the appellant as a student in the relevant circumstances and had no residual discretion to decline to do so.

[31] When one studies the detailed submissions made by the appellant, it is at once apparent that he is seeking to complain of what are essentially factual matters arising out of the evidence upon which the conclusion of the learned Chief Magistrate was based. Indeed, the very particulars of the ground pleaded in his amended notice of appeal conclude by asserting that the finding made was "*against the weight of the evidence*".

[32] Certainly there is an alternative plea that the learned Chief Magistrate addressed the wrong issue and should have identified the relevant issue as being whether the principal has an authority to overturn the decision of the

previous principal regarding the enrolment of the appellant. Whether that be so or not, it must be said that this issue was essentially peripheral to the central issue of the state of mind of the applicant in acting as she did.

[33] Ground seven of the amended notice of appeal contains something of a grab bag of complaints concerning the ultimate decision relating to the cause of action based on the alleged defamation. Of the five specified particulars, four of them specifically conclude with assertions that the findings of the learned Chief Magistrate are "*against the evidence*". Distilled to the essence, they seek to re agitate issues of fact. Although the third particular does not so conclude, it is, in substance, also a complaint of what is said to be an unjustified finding of fact.

[34] In essence, the same situation arises in relation to the particularised pleading in grounds 8, 9, 10 and 11.

[35] In short, it is apparent to me that, generally speaking, the appellant has, in the main, sought to dress up a variety of issues relating to findings of fact, as asserted errors of law.

[36] In my opinion, it is obvious that at least most aspects of the appeal have little or no chance of success because, on the information presently before me, they do not seek to raise questions of law within the meaning of s 19 of the Local Court Act. It must inevitably be concluded that the appeal, as presented, has little prospect of success.

Conclusion

[37] I conclude that the obvious impecuniosity of the appellant, coupled with the fact that the appeal has little apparent prospect of success, constitutes special circumstances within r 83.11(1) of the Northern Territory Supreme Court Rules. I consider that the applicant has plainly established the conditions pre-requisite to the making of an order for security costs. I am also of the view that, in the circumstances, it is proper that such an order be made.

[38] Accordingly, there will be orders in terms of paragraphs 1 and 2 of the applicant summons. The costs of the present application will be costs in the cause in relation to the appeal proceedings.
