IN THE COURT OF APPEAL OF NEW ZEALAND

CA587/2010
[2011] NZCA 12

BETWEEN	JOSEPH LOCKWOOD TANA Appellant
AND	THE ATTORNEY-GENERAL Respondent

Hearing: 10 February 2011

Court: O'Regan P, Stevens and Wild JJ

Counsel: Appellant in person
A J Williams for the Respondent

Judgment: 16 February 2011 11:30:00

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is dismissed.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Wild J)

[1] Mr Tana applies for an extension of time to appeal against a judgment of Joseph Williams J delivered on 29 June last.[1]

[2] The Judge refused to set aside orders made by consent by Associate Judge Gendall on 7 May 2008, in terms of a settlement agreement reached between the parties at a settlement conference presided over by Associate Judge Gendall earlier that day.

[1] *Tana v Attorney-General* HC Wellington, CIV 2009-485-1655 29 June 2010.

[3] There is no challenge to the accuracy of the factual background set out in the judgment. In November 2000 Mr Tana's two young sons were taken from their mother and placed in the custody of the Chief Executive of the Ministry of Social Development, pursuant to s 40 Children Young Persons and Their Families Act 1989. Section 45 of that Act stipulated that the boys be brought before the Family Court within five working days. Only after 59 days did this happen, although the Chief Executive's custody of the boys was confirmed by the Family Court after protracted proceedings.

[4] This breach of s 45 was the reason for Mr Tana suing the Crown in November 2004. In an amended statement of claim filed in May 2005, in addition to breach of the s 45 duty owed both to his sons and to him, Mr Tana alleged that his sons had been falsely imprisoned and their rights under ss 21, 22 and 23 New Zealand Bill of Rights Act 1990 breached. In addition to a declaration as to those breaches, he claimed public law compensation in favour of his sons of $500,000. Subsequently, in September 2005, Associate Judge Gendall granted Mr Tana's application to add his sons as plaintiffs and to appoint him their litigation guardian.

[5] Amongst the terms of the 8 May 2008 settlement agreement were these:

(a) The Ministry was to provide a written apology to Mr Tana in agreed terms.

(b) A past costs order that Mr Tana pay the Crown $2,557.50 was set aside and the other costs of the proceeding were to lie where they fell.

(c) The Ministry was to pay each of Mr Tana's two sons $2,500 in full and final settlement of their claims, the money to be held in trust until each boy turned 18.

(d) The Ministry undertook to convene a meeting with Mr Tana to discuss custody and access arrangements for the two boys and improving Mr Tana's long term relationship with them, including supporting Mr Tana to seek relevant counselling.

(e) The plaintiffs agreed not to bring any subsequent proceeding in connection with the subject matter of the then current proceeding, although Mr Tana was expressly not precluded from applying to the Family Court in respect of access and custody of his two sons.

[6] Mr Tana's submissions to us – brief written ones supplemented orally – were these:

(a) He referred to the "landmark declaration aimed at guaranteeing the rule of law" at the Human Rights Conference in Copenhagen, emphasising that the Courts should uphold one law for all New Zealanders.

(b) He contended that what had been agreed on 7 May 2008 had not been honoured by the Ministry. Nothing had come of the agreement. Instead, things had got worse.

(c) He maintained the judgment of Joseph Williams J was wrong.

[7] In the course of Mr Tana responding to questions from the Court about the latter two of these points, it emerged that Mr Tana's real complaint was that his access to his two sons had been curtailed, as a result of what he termed a "mishap". He explained that this was a disagreement between him and the Ministry official supervising his access. When the Court asked him in what respects the judgment of Joseph Williams J was wrong, Mr Tana responded that there was a "difference in his opinion and mine".

[8] Before Joseph Williams J, Mr Tana had submitted:

(a) The circumstances in which he signed the settlement agreement were such that it was unjust he be bound by its terms, particularly as his mother was very ill at the time.

(b) Ministry officials had blocked or undermined implementation of the settlement agreement.

[9] For the Attorney Ms Williams submitted that the problem was Mr Tana's relationship with the Ministry, and possibly with his two sons. She pointed out that the agreement did not guarantee Mr Tana access or attempt to define terms of access. Rather, the Ministry had agreed to discuss custody and access arrangements with Mr Tana and to explore ways of improving his relationship with his sons. Ms Williams pointed out that the agreement was still in force and that Mr Tana could still take advantage of the Ministry's undertaking to meet him and discuss matters. Responding to a question from the Court, Ms Williams said that Mr Tana's contacts in the Ministry were Mr Young and Ms Divers, both of whom had sworn affidavits in the case. Ms Williams said that Ms Divers was in Court for the hearing. The Court then suggested to Mr Tana that he take the opportunity of speaking to Ms Divers at the end of the hearing, and Mr Tana said he would do that.

[10] Joseph Williams J accepted he had jurisdiction to set aside the consent orders, either because they were founded upon an agreement vitiated by mistake, or because the Ministry had breached the agreement to an extent rendering it unjust to hold Mr Tana to it. This Court's decision in *Phillips v Phillips*[2], referred to by the Judge, is authority specifically for the first of those grounds for setting aside. *Auckland Regional Services Trust v Lark* confirms that the High Court has inherent jurisdiction to set aside a consent order if the interests of justice require it, but only if good grounds are established.[3] Before us, Ms Williams accepted there was jurisdiction. The issue is whether Joseph Williams J erred in not exercising it.

[11] Joseph Williams J was unable to accept that Mr Tana had not freely and advisedly entered into the agreement that underlay the consent orders he sought to overturn. The Judge noted Mr Tana's submission that his mother had died within a few days of the agreement, and that her illness and impending death had unduly pressured him to settle. The Judge pointed out that Mrs Tana had in fact died in fact two months after the settlement agreement. Further, the Judge recorded that Mr Tana was legally represented during the settlement conference and in negotiating the settlement agreement. Nothing in the evidence before the Judge throws any doubt on the correctness of his rejection of Mr Tana's submission that he was unduly

---

2 [1993] 3 NZLR 159 CA at 166-167 per Cooke P and 172 per Casey J.
3 [1994] 2 ERNZ 135 (CA) at [139].

pressured in entering into the agreement. Nor has anything Mr Tana has submitted to us suggested that.

[12] Joseph Williams J found that the Ministry had substantially complied with the settlement agreement. Mr Tana accepted that he received the agreed apology, and that the $5,000 compensation for his two sons had been paid. There were delays in the Ministry convening the agreed meeting with Mr Tana: it did not take place until 4 August 2008, three months after the settlement agreement, and about a month after Mr Tana had written to the Ministry on 9 July 2008 complaining that the agreed meeting had not occurred. Although the Ministry accepted responsibility for delay, it seems from the material the Judge had that Mr Tana was not blameless. Affidavits filed for the Ministry in the High Court record Mr Tana having access to his two sons from at least December 2009, the visits (which involved Mr Tana travelling to Auckland) being funded by the Ministry. Those affidavits record on-going difficulties with supervision of the access, as a result of Mr Tana's conduct toward those supervising the access. We need not go further into the detail; our point is that it appears that Mr Tana is by no means blameless in relation to the on-going problems in implementing access to his two sons. We can see nothing suggesting error in Joseph Williams J's assessment that the Ministry had substantially performed its obligations under the settlement agreement.

[13] Mr Tana requires an extension of time to appeal, because he filed his notice of appeal only on 13 September 2010, some 33 days out of time. In the interim, he had incorrectly applied to the High Court for leave to appeal, we gather because Registry staff had advised him that that was the appropriate procedure. No prejudice to the Ministry has resulted from Mr Tana's delay. However, his proposed appeal lacks merit.

[14] In the circumstances, balancing the established criteria under r 29A Court of Appeal (Civil) Rules 2005, we extend Mr Tana's time for appealing to 13 September last when he filed his Notice of Appeal, but dismiss his appeal as meritless.

[15] Given that the Ministry accepts a degree of responsibility for the delays that led to this litigation, we make no order for the costs of the appeal.

Solicitors:
Crown Law Office, Wellington for the Respondent