IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No 295/84

NZCR

2-3

LOW PRIORITY

147

BETWEEN

ILOLAHIA of Auckland, Manager

Plaintiff

AND

NEW ZEALAND NEWSPAPERS LIMITED a duly incorporated company carrying on business as newspaper proprietors and publishers of Auckland

Defendant

A N D

A. No 325/84

BETWEEN

PARATA of Auckland, Social Worker

Plaintiff

A N D

NEW ZEALAND NEWSPAPERS LIMITED a duly incorporated company carrying on business as newspaper proprietors and publishers, of Auckland

Defendant

Hearing: 3 March 1986

Counsel: Mr R.P. Towle for Defendant
No appearance for Plaintiffs

Judgment: 3 March 1986

ORAL JUDGMENT OF SMELLIE J.

This is a matter in which Mr Towle, counsel for the defendant in two actions brought by the plaintiffs named

Parata and Ilolahia, being respectively action numbers 325/84 and 295/84, seeks an Order under s.17 (2)(e) of the Legal Aid Act 1969.

The background to both of these cases is that during the Springbok Tour in 1981 and in particular in relation to the Third Test held at Eden Park, both plaintiffs were charged with criminal offences associated with their part in protest action. In due course they were to stand trial in respect of these offences in the District Court before District Court Judge Gilbert and a jury on the 28th February 1983. On that day the defendant in both these actions, New Zealand Newspapers Ltd, published in the Auckland Star an article which was headed "Attempts to Rig Bok Jury Alleged". As a result of that publication Mr Towle advised me from the Bar the learned District Court Judge controlling the jury trial decided that that trial had to be abandoned. I understand he commented to the effect that the publicity was unfortunate at that particular time. Subsequently the criminal trials proceeded and again Mr Towle was able to advise me that both plaintiffs were acquitted.

Subsequently again the plaintiffs both issued writs against New Zealand Newspapers on the 6th April 1984 claiming that they had been defamed by the article that I have referred to and that the contents of the article and the circumstances under which it was published clearly amounted to allegations against them which were defamatory of them. Each of them claimed damages of $50,000 for general damages and a further $50,000 for aggravated or exemplary damages.

New Zealand Newspapers responded with Statements of Defence on the 6th June 1984 admitting the publication of the article but denying that it was defamatory and further contending that the reports were fair comment on matters of public interest. The two actions were set down for

trial before a jury in due course, the praecipes being filed on the 18th April 1985. No doubt they came up in a callover list and they were allocated a date of hearing for the 3rd March 1986.

When the matter was called before me this morning counsel for the plaintiffs did not appear but he had advised Mr Towle on or about the 25th or 26th February last that the plaintiffs did not propose to proceed. In the mail on the 3rd March 1986 Mr Towle received and was able to hand in discontinuances in respect of each action. Mr Towle as earlier indicated now asks for an order under the appropriate section of the Legal Aid Act fixing costs that are to be paid by these two plaintiffs who have discontinued their actions. Section 17 (2)(e) also provides that if such order for costs is made the order that otherwise would have been made had the plaintiff, or plaintiffs in this case, not been legally aided, can also be recorded, and Mr Towle asks me to take that step also.

I am advised from the Bar that in this instance when legal aid was granted to the two plaintiffs the minimum contribution of $15 each was required of them, so I have to address this application on the basis that that was what they were asked to put up out of their own pockets before legal aid was granted to them. The section in question provides in essence that I must first consider what reasonable costs would be in all the circumstances and I am to have regard to the means of the parties and their conduct in connection with the dispute.

Looking briefly at those matters I have no information before me as to the means of the plaintiffs except that I am advised that one of them has returned to his native country, Tonga. On the other hand of course Mr Towle properly concedes that the defendant newspaper is solvent and one can infer possessed of significant assets.

When one comes to the conduct of the parties in connection with the matter it seems to me that the fact that the article giving rise to the actions was published on the very day that the trial commenced and was the reason why the trial was abandoned must be significant. However, even when I address the question of what the costs would be the first proviso in the subsection provides that:-

> "...except in exceptional circumstances the said amount shall not exceed the amount of the contribution which he is required to make to the Crown under paragraph (c) of this subsection."

The effect of that of course is that Mr Towle has to satisfy me that there are exceptional circumstances here before I can award against either of these plaintiffs a sum in costs in excess of $15.

Mr Towle advanced several reasons in support of his proposition that there are exceptional circumstances here. The first was that legal aid either has not previously been granted in defamation cases or alternatively that it is very rare for such to be the case. I am inclined to think that Mr Towle is not correct about that because I find that in the Brooker and Friend Consolidated Case Annotations that Quilliam J. decided such an application in November of 1983. The case is Edhouse v Wellington Newspapers Ltd. It is unreported, but it was a case very like this one where defamation was alleged and the case was discontinued. There Quilliam J. looked at the circumstances of the parties and found that there were no exceptional circumstances. On that issue the brief report reads:-

> "In regard to the second issue of exceptional circumstances, whilst there had been a delay of four years, a failure to appear, a change of counsel and a late notice of discontinuance

Quilliam J. was not prepared to conclude that there were exceptional circumstances."

I find also that there is reported in the New Zealand Administrative Reports the case of A. No LAA 57/83, (4 NZAR 389), a decision of the Appeal Authority, the Chairman being Mr McLelland Q.C. and the other members being Messrs R.A. Heron (as he then was) and D.J. More. That was a case in which the appellant had been legally aided on the first round of a jury trial. A new trial was ordered. By the time the second trial was due to start his costs had risen to $50,000 and he was granted legal aid to carry on, subject to a contribution of $15,000.

So it seems to me that the mere fact that it is a defamation case provides no grounds for saying that the circumstances are exceptional. Indeed for myself I would have thought that defamation cases should not be in any different circumstances than any others. Afterall a man's reputation is one of his most precious possessions and he ought to be able to defend that as readily as any other issue which affects him. Mr Towle also mentioned that the trial had been abandoned, but as I have pointed out, that was the situation that presented itself to Quilliam J in the Wellington case and I do not find that to be a factor here any more than he did there. Finally Mr Towle said that defamation is a complex cause of action, difficult both in fact and in law. I agree but I see nothing exceptional about that and indeed one might be inclined to think that in cases where the law is complex and the facts difficult the availability of legal aid to a party who could not otherwise either prosecute the claim or defend himself is all the more appropriate. In these circumstances therefore I am not prepared to award against these two plaintiffs any more than costs of $15 each.

I should, however, go on to make a finding pursuant to the second proviso and in that regard Mr Towle has

provided me with schedules of costs associated with preparation up to the point of discontinuance. The schedules taken individually are perfectly reasonable. Mr Towle was able to tell me that he had interviewed and subpoenaed no fewer than eight witnesses and they, I gather, were people who had been on the jury and so he would have had to seek them out and gain their briefs of evidence in circumstances that would be time consuming. The figure in each schedule for preparation for trial of $1150 seems to me to be not at all out of the way. But I think I have to take into account the fact that the pleadings in both these actions are identical, both the Statements of Claim and the Statement of Defence and that the brief of any one of these eight witnesses, once briefed, would serve equally well for one action or the other. Both of them of course were going to be heard together. So I do not feel under those circumstances that I can properly award $1150 for preparation of trial in both cases. I propose therefore to award in each case not the total of $1600 that Mr Towle seeks but the reduced sum of $1100 in each case.

I have just said I propose to "award", in fact I am not doing that, I am specifying pursuant to the second proviso of s.17(2)(e) of the Legal Aid Act 1969 that had the plaintiffs in this case not had the benefit of that provision then the costs that I would have awarded against them would have been $1100 for each case.

Smellie J.